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ABSTRACT

Five papers presented at the conference on "Higher Education: The Law and the 1980s in Perspective," held under the sponsorship of the Institute of Higher Education and the Center for Continuing Education of the University of Georgia, are reproduced in this document. Richard Thigpen discusses differences between legal factors affecting public and private educational institutions: the increasingly contractual nature of relations between colleges, their students, and their faculties: and the expansion of governmental and judicial jurisdiction over colleges and universities. Patricia Hollander reports on changing public policy regarding the education and employment of the handicapped and recommends reasonable efforts made in good faith to provide access to the handicapped. Henry Neal evaluates the status of immunity from personal liability for administrators, noting the importance of distinguishing between discretionary and non-discretionary functions. D. Parker Young analyzes court cases touching on student rights and the growing willingness of courts to intervene in such matters. N. Shelton Hand describes the impact of governmental regulation, financial exigency, and labor negotiation on employment practices in postsecondary education, and predicts challenges to federal regulations during the 1980s. (Author/PGD)

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Proceedings

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Edited by

D. Parker Young

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Introduction

Institutions of higher education have faced a variety of challenges throughout the 1970s which have had and will continue to have a significant impact upon their operations and functions. The legalistic framework continues to expand, further complicating the responsibilities of administration in higher education. We are entering a new decade in which legal actions will continue to define the parameter within which individuals and institutional decisions are to be made and actions taken.

In order to aid higher education administrators in fulfilling their responsibilities, and meeting the challenge of the 1980s, the Institute of Higher Education and the Center for Continuing Education jointly sponsored the conference *Higher Education: The Law and the 1980s in Perspective* on July 9–10, 1979. The topics discussed by the conference speakers are the subject of this publication.

Richard Thigpen addresses the present trends and the future implications of the law governing higher education. He points out that the relationships between an institution and the student and between the institution and the faculty member are becoming contractual. Mr. Thigpen expects the 1980s to bring a strengthening of the contractual relationship, the narrowing of the rights of non-tenured faculty to employment, an increasing frequency of the government's requiring compliance with equal protection and due process standards as conditions for accepting federal funds, the extension of "state action" to nongovernmental agencies, and an increased concern for the personal liability of institutional officials. He concludes that "there seems to be no abatement of the continuing expansion of judicial jurisdiction over colleges and universities."

Patricia Hollander makes an in-depth report on higher education and the handicapped. She discusses the development of the general public policy regarding the handicapped and reviews recent cases of significance. Two major cases presented in depth are the *Davis* case regarding admissions and the *Beazer* case which concerns employment. She points out that the handicapped cannot be denied access if they are otherwise qualified and warns that the courts will not hesitate to intervene when educators have failed to accept this fact. Ms. Hollander concludes, "Institutions that make reasonable and good faith efforts to meet the specific requirements relating to architectural barriers, affirmative action in employment, and nondiscrimination should have few legal problems."

Official immunity as a solution for the personal liability faced by administration today is discussed by Henry Neal. He begins with a discussion of the antecedent of sovereign immunity and then proceeds with an in-depth review of the development of official immunity. Neal warns that such immunity is not absolute but applies only to the exercise of discretionary power, by administrators, within their scope of their official duties. The current difficulty is defining the fine line that exists between discretionary and non-discretionary functions. He suggests that the issue has been further escalated by the Civil Rights Act and cites instances in which this has occurred. Neal concludes that until statutes are passed defining official immunity or until there is judicial extension of such a doctrine, "the best advice that one might suggest is to act honestly, fairly, in good faith, and on the advice of counsel."

N. Shelton Hand presents a timely discussion of the current status and future changes in the selection, appointment, and retention of faculty and staff. He suggests that this process is being more closely evaluated and scrutinized than ever before due to labor contract negotiations, growth of affirmative action, the Title IX impact, issues of age, and financial exigency. The financial aspects will become an even bigger issue in the 1980s. He predicts that we will see a need to clarify academic freedom as a special concern of the First

Amendment and to determine the "degree of its application to the [institution]." Further, Mr. Hand forecasts an increasing challenge to federal regulations that go outside the law through litigation that will force the issue of legislative intent and constitutional meaning. He concludes, "the 1980s will be forced to wrestle with clarification of previous rules as well as the development of new ones."

In discussing recent court decisions affecting student life, I suggest that students' rights must be protected and that the faculty must be educated concerning these rights, particularly in academic matters, and possible liability. I detail several recent cases that demonstrate the contractual relationship that exists between students and institutions in the academic arena and the growing involvement of the courts interpreting and enforcing these contracts. The courts are still reluctant to enter the academic arena, but they increasingly will enter to insure basic fairness.

The law is not static but ever changing. In order to face the challenges of the 1980s, higher education administrators must be aware of the changing legal parameters for higher education. To aid administrators in meeting this challenge was the purpose of the conference.

D. Parker Young
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Present Trends and Future Implications of the Law Affecting Higher Education

Richard Thigpen
Vice President for Academic Affairs
University of Alabama

Let me express my pleasure in being invited again to participate in the University of Georgia's annual conference on higher education and the law. Through the dedicated efforts of Parker Young, the leadership of Cameron Fincher and your Institute of Higher Education, and the consistently strong support of the University of Georgia, your conference has become the foremost annual meeting of its type in the nation. I congratulate each and every one of you on this and extend my sincere hopes for continued distinction in this vital educational area affecting our nation's colleges and universities.

I have been asked to speak with you on present trends and future implications, as respects the law governing higher education. Those of you who were at the conference two years ago will note that much of what I say is by way of review and background and reflects what I presented at that time.

The "Public" and "Private" Institutions

In this respect, I would first note that, in our audience this afternoon, there are representatives of both "public" and "private" institutions of learning. It is appropriate, therefore, to note that constitutional and legal standards applied to these two types of institutions differ considerably. This stems from the fact that the Fourteenth Amendment of the Constitution--considered the source of most student and faculty rights--protects persons only against actions by an instrumentality of "state" government. Thus persons in private institutions of higher learning do not enjoy those same "rights" and prerogatives one usually envisions when he interprets, loosely, the terms "student rights" or "faculty rights."

Yet, this does not mean that constitutional norms and precepts, as embodied in the Fourteenth Amendment, never apply to otherwise-private institutions of learning. Rather, those norms, when applied, are done so indirectly--that is, by some judicial extension of "state" action or governmental jurisdiction.

In regard to the "state action" clause, I noted in my comments two years ago numerous theories whereby action of an otherwise-private entity may be interpreted as action by the state. Private colleges, for example, may assume the cloak of state responsibility when they accept governmental funding or share in other areas of "state involvement." Moreover, a functional interpretation of the Fourteenth Amendment would hold institutions accountable to due process and equal protection standards, on grounds that education is one of the most essential and basic of state functions.

Courts also have employed Fourteenth Amendment norms by extending various authority provisions of the U.S. Constitution to otherwise-private institutions. The Interstate Commerce Clause, for example, has been extended to assure "equal protection" to citizens in public accommodations, under the Civil Rights Act of 1964.

Similarly, theories of natural justice and equity, applicable to *all* private associations, have been employed to effect norms of fair play and process where students or faculty have had their status interrupted. An illustration is offered by the case of *Green* v. *Howard University*. There, the U.S. District Court ordered that otherwise "private" institution to afford a hearing and other incidents of due process before terminating the status of a regularly-employed faculty member.

By far the most pervasive extension of Fourteenth Amendment norms, however, occurs by virtue of the decision--indeed, the *voluntary* decision--of colleges and universities to accept federal financial support. Having accepted such

support, institutions--both public and private--are mandated to abide by the conditions which may be attached. This ever-growing, federal "regulation via the purse string" has, in recent years, become a major means of assuring "equal" treatment of minorities in our nation; at the same time it has become perhaps the most controversial subject in American higher education. More will be said on this later.

Past and Present Trends

Assuming an institution *is* subject to Fourteenth Amendment norms of due process and equal protection, it must, necessarily, abide by such constraints, in its relations with both students and faculty. As I noted two years ago, there must, of course, be a legal relationship which gives the student or faculty standing to propound a claim against the institution; similarly, there must be such a legal relationship to give the institution jurisdiction for actions which may negatively affect the status of a student or faculty member. In the case of students, the principal relationship theories have been those of (1) *in loco parentis*, (2) contract, and (3) student-as-citizen. As respects faculty, the relationship essentially is one of contract, qualified by the fact that institutions confer, after varying periods of time, what is, in effect, a "lifetime contract" through the means of academic tenure. During the term of the contract--whether it be for one year, two years, or a lifetime--the relationship is governed, as in the case of a student after admission, by terms spelled out in a handbook or other written documentation. With the advent of the student-as-citizen and faculty-as-citizen theories, courts have taken the view that the status of a student or faculty member cannot be altered during the term of the relationship without compliance with due process standards.

It should be noted that the Fourteenth Amendment norm of due process goes both to the substance of institutional regulations governing the student and faculty and to procedures employed in altering those relationships. As to the former--that is, the matter of "substantive due process"--courts reach their judgments by balancing the authority of the institution, under the standard of "lawful educational mission," against the protected right or claim of the student or faculty member. Thus, the guaranteed right, whether it relates to such student matters as outside speakers, student newspapers, parietal rules, search and seizure, and personal appearance, or to similar areas affecting the faculty, is determined through a judicial balancing act. While this suggests no "rights" truly exist in the abstract, it should be noted that, where a given form of expression involves "substantial disruption" of the educational enterprise, courts usually find it outside the realm of protection.

Procedurally, expression that is not protected under the Fourteenth Amendment may, nonetheless, receive protection if the institution fails to administer its disciplinary action in a manner commensurate with procedural due process. The rudimentary requirements, both in respect to students and faculty, relate to (1) adequate notice of charges, accusers, and proceedings, and (2) a fair, fact-finding hearing.

In the case of faculty, there also has developed a large body of law as respects the status of non-tenured instructors--that is, faculty who do not, necessarily, have a guaranteed status or relationship to which the preceding standards may be applied. Also, substantial non-constitutional protections have been afforded faculty, through the means of collective bargaining agreements, in states where public sector organization is sanctioned. In the private institutions, of course, faculty now can organize themselves under provisions of the National Labor Relations Act.

Future Directions and Implications

Student Rights and Responsibilities

As regards future directions and implications, I would note, initially, that in recent times there has been little expansion in the law affecting students and their relationship with the institution. There are, however, two or three areas in the student realm which bear attention.

Contract Relationship, Student Consumerism, Academic Malpractice

As noted earlier, one of the accepted theories of the student relationship is that of "contract."

Under this view, the student promises to abide by college regulations in exchange for the institution's promise to provide educational benefits. Accordingly, if the student breaches his contract by breaking the rules, the institution may withdraw benefits, or even rescind the contract by means of a suspension. While a substantial body of law has developed regarding the student's obligations, very little has been said until recent times regarding the obligations of the institution. Does the institution, for example, merely promise to certify a certain number of courses passed, or completion of a degree; or does it promise that the student will "learn" a certain amount of knowledge and thereby be able to compete in the job market? The latter issue has arisen in recent litigation, the most notable being the *Peter Doe* case in California. There, a student successfully sued his high school for failure to prepare him with more than sixth-grade reading skills. Another recent case involved a graduate of Southern University Law School in Louisiana, who sued the institution after failing the state bar examination. The graduate alleged, in effect, that the institution had breached "its" contract to teach him sufficient law to pass the bar examination and become employable in the legal profession.

The cases themselves are not nearly as significant as the premise on which they are based--namely, that there is an obligation by the school or college to impart certain knowledge--and that this obligation is enforceable in a court of law. In our current era of accountability, this is an area which is likely to receive increased future attention, whether it be through the arguments of contract, breach of tort-duty, consumerism, or academic malpractice. Moreover, with courts now holding individuals as well as institutions legally responsible, it is a matter of sure interest to faculty, as well as to administrators and trustees.

Academic Discipline

Another area of likely litigation in the student area involves academic misconduct and discipline. While courts have been quite liberal in extending Fourteenth Amendment guarantees in non-academic discipline, they have been equally reticent in intruding on the academic process. Thus, institutional decisions as to the award of degrees, the granting of grades, scholastic probation and suspension generally have been immune from judicial review and requirements of due process. This must, of course, be distinguished from personal misconduct in regard to meeting academic requirements, such as cheating and plagiarism. In those cases, courts apply the same due process standards applicable to other areas of student discipline.

Most litigation regarding academic discipline has arisen at the graduate or professional level. The Alabama case of *Rose* v. *Mustell* reflects the traditional view taken by courts. In that case, a third-year medical student at the University of Alabama was dismissed from the program on grounds of scholastic insufficiency. In rejecting the student's argument that he was entitled to a hearing and notice prior to dismissal, the court said that, in the absence of arbitrariness or bad faith, the judgment of the school's faculty was not subject to review.

More recently, in a case involving the University of Missouri, a lower court held that a student dropped from a graduate program for failure to perform properly in a clinical experience was, indeed, entitled to the basic elements of due process. On review, the U. S. Supreme Court reversed the decision, holding that, in the absence of bad faith, due process standards did not apply.

Whether the latter case--the now-famous *Horowitz* case--signals a change in judicial approach to academic discipline remains to be seen. However, such a change, involving the invocation of due process standards in academic decisions, would constitute a major departure from past practice and law. It is certainly an area to watch in the future.

Admission Policy

It should be noted that, in its famous *Bakke* decision, the U. S. Supreme Court has perhaps opened the door to judicial scrutiny of institutional admission decisions at all levels. *Bakke*, like the earlier *Defunis* case, involved an honor student who was refused admission to professional school while minority applicants with lesser qualifications were admitted. In *Defunis*, the Supreme Court declined to render a decision on the merits, because at the time of hearing Defunis

had received his diploma from the University of Washington Law School. Defunis had been admitted after a court of first instance granted him a temporary restraining order, on grounds that reverse discrimination had been practiced. In *Bakke*, there was a similar finding of reverse discrimination in both the trial and appellate courts of California. Yet, unlike Defunis, Bakke declined to accept admission until his litigation was complete. Thus, in its now-landmark decision, the U. S. Supreme Court confirmed the finding of reverse discrimination against Bakke, while at the same time finding that the minority admission plan used by the University of California at Davis was not unconstitutional. Though the latter part of the decision has been interpreted as a confirmation of governmental affirmative action efforts, the Court might have given stronger support in this regard had it supported the institution's decision under the principle of "catch up," applied so extensively following the decision of *Brown* v. *Board of Education*.

There can be no question but that *Bakke* has opened the door for further questioning of institutional admission policies. Moreover, its finding of reverse discrimination may, in the future, raise similar questions regarding other "special" admission factors, such as handicaps, gifted abilities, etc. What the future holds cannot be entirely predicted.

Faculty Status

Non-tenured Faculty

Interestingly, the most abundant area of litigation regarding faculty in the last decade has involved the rights of non-tenured instructors. The landmark decisions of *Perry* v. *Sindermann* and *U. S.* v. *Roth* established the principle that untenured faculty do not have a protected status of "expectancy" of reemployment unless, on the facts, they can show that the institution has conferred such an expectancy or what amounts to de facto tenure. At the same time, the cases also recognize that non-tenured teachers *do* have a right to expect that their employment will not be terminated or "non-renewed" because of an exercise of their constitutional rights.

A further narrowing of the rights of non-tenured faculty occurred recently when the Supreme Court ruled that faculty have the right only to expect that exercise of their constitutional rights is not a "substantial" part of the justification for their non-renewal.

Faculty Bargaining

As noted earlier, the last decade saw an expansion of faculty rights through the means of collective bargaining and application of the labor union model to the faculty relationship. Like the area of non-tenured faculty, this may have been largely a phenomenon of the decade; and while a decrease in organizational activity is not predicted, there is likely to be no major expansion in this area. On the other hand, one can predict continued efforts through the Congress to repeal the public-agency exemption of the Taft Hartley Law and allow faculty of state institutions of higher learning the same NLRB remedies as now are afforded to those in private institutions.

Rights via the Purse String

The largest extension of Fourteenth Amendment norms in recent times has been in the area of regulation via the purse string. There seems little question that the government may require, as a condition of accepting federal funding, compliance with equal protection and due process standards. An important issue presented, however, relates to the remedy available to the individual aggrieved, and whether he or she may have a private right of action. Recall that the sanction for failure to comply with federal funding legislation is withdrawal of federal funding. As of this time, there has been little litigation on the question of private rights of action, but more activity in this area may reasonably be predicted in the future.

It is helpful to mention a few specific areas where rights have been extended via the purse string.

1. **Anti-discrimination laws**. There are at least a dozen pieces of federal legislation mandating non-discrimination on the basis of race or sex in institutions receiving federal funds. Remedies vary from affirmative action

before-the-fact, affirmative action following investigation, and/or complaint, to direct court action. One highly-publicized area of litigation now is in North Carolina, where HEW is threatening to cut off federal funds for the state's failure to meet HEW's standards for eliminating its dual system of higher education. This occurs under Title IX of the Higher Education Act.

Since much of the North Carolina difficulty involves duplication of programs at contiguous black and white institutions, it is interesting to note the recent court ruling in Tennessee ordering merger of the University of Tennessee's Nashville branch and the predominantly black Tennessee State University. The latter litigation, however, was filed under the Fourteenth Amendment.

2. **Title IX.** The now-famous Title IX of the Higher Education Act prohibits discrimination on the basis of sex in programs receiving federal funding. Much of the current activity surrounding Title IX relates to intercollegiate athletics and requirements of "equal" or "comparable" opportunities. Two of the most important factors from the institution's standpoint were (1) the government's interpretations that *all* programs in an institution, irrespective of funding source, are covered by Title IX, and the corollary ruling that (2) revenue producing athletics are not to be exempted. It is without question that compliance with Title IX requirements will--and should--entail substantial outlays of funding by institutions to meet the comparability requirements. Probably, this will also result in hard decisions regarding the number of non-revenue producing sports an institution will continue to sponsor. There is, for example, no requirement that an institution offer a given sport, or indeed any sports at all. However, if it offers a sport to one sex it must offer it on a comparable basis to the other sex.

3. **Section 504.** Much of current legal activity on campuses surrounds efforts to comply with Section 504 and related requirements regarding rights of the handicapped. Some of the more taxing problems may, in the long run, relate to the earlier-mentioned issue of equal treatment at all levels in the college admission process. Special problems may develop, and are already developing, regarding admission to such special programs as law and medicine, where one may have the handicap of deafness or blindness. Litigation in this area is developing, and it is a definite area to watch for the future.

Regulation by Non-Governmental Agencies

Another area of future legal activity relates to regulation of institutions by non-governmental agencies. A few years back, concern heightened over enhanced power of accrediting agencies, especially as they employed their "life-or-death" quality control powers as a means of impinging on decisions regarding institutional personnel and governance. The *Marjorie Webster* case and related litigation can be recalled.

The most recent controversy, however, relates not to academic accreditation agencies but to the powerful National Collegiate Athletic Association, itself a voluntary, third-party agency, making decisions which have major impact on institutions, their athletic staffs, and participating students. Predictably, this is an area for continued litigation in the future, both as respects efforts to extend state-action principles to this otherwise-private association, and also in respect to alleged impingement on delegated, institutional authority. Presumably, the legal principles developed will also be relevant to activities of academic accrediting associations.

Personal Liability of Institutional Officials

Predictably, the issue of personal liability of institutional officials will be a continuing subject of litigation. After the landmark decision of *Wood* v. *Strickland*, commentators predicted we would see the abandonment of the traditional "good faith" standards in decision making, and the substitution of standards which hold officials to a strict knowledge of law in decisions affecting students and faculty. While *Wood* laid the predicate for such an approach, there has been a curious lack of litigation in this area. To some extent, the lack of litigation may be explained by

efforts in many states to insulate officials from court liability through insurance and indemnity agreements. In any event, this is an area, once again, with major implications for faculty, staff, and administration at all levels. It certainly bears watching for the future.

Conclusion

Through this presentation, I have endeavored to outline some major areas of future legal activity in the backdrop of developments over the past decade, relationships of students and faculty, and the very basic distinction between norms in the public and private sectors. A year from now, the issues may perchance be different, but in any case there seems to be no abatement of the continuing expansion of judicial jurisdiction over colleges and universities. Moreover, the increased involvement by government in protecting rights via the purse string makes law and higher education a mandatory topic of study and debate in colleges over our land. This being the case, administrators, faculty, and educators at all levels are well-advised to continue their interest in this area, and their attendance at conferences such as this.

Higher Education and the Handicapped: Current Status and Future Prognosis

Patricia A. Hollander
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Introduction

In June 1979, the law regarding admission of handicapped persons to institutions of higher learning was clarified somewhat when the U.S. Supreme Court handed down its decision in *Southeastern Community College* v. *Davis*.[1] In that case, a handicapped person with a severe hearing disability was denied admission to a professional school's clinical training program for registered nurses. Her suit against the college alleged a violation of Section 504 of the Rehabilitation Act of 1973[2] which prohibits discrimination against "an otherwise qualified handicapped individual" in federally funded programs solely by reason of the handicap. Essentially, the Supreme Court found that an otherwise qualified person is one who is able to meet all of a program's requirements *in spite of* the handicap, and that legitimate physical qualifications may be essential to participation in particular programs, such as a professional clinical training program. The Court upheld Southeastern's refusal to admit Davis, stating:

> Nothing in the language or history of Section 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.[3]

What does this case tell us about other issues regarding the handicapped? For instance, does this case clearly indicate under what circumstances educational institutions must provide handicapped students, who are admitted appropriately, with auxiliary aids such as interpreters for the deaf? What does it tell us about Section 503 of the Rehabilitation Act of 1973, which requires that all federal contractors, including educational institutions, have affirmative action employment programs to hire and promote qualified handicapped persons? What does it tell us about providing access by removing architectural barriers as required by Section 502? To see this case in some perspective and look to the future for a prognosis for higher education, it would be helpful to take into account how general public policy regarding handicapped individuals developed.

Development of Public Policy Regarding Handicapped Persons

Handicapped students and employees have had little until very recently in the way of legal rights regarding their admission to or employment by institutions of higher education. The same could be said generally for handicapped pupils or employees at the elementary and secondary school levels. Two major federal statutes have made substantial changes in the relationship of handicapped individuals to educational institutions. One is the Rehabilitation Act of 1973, Public Law 93–112, along with its implementing regulations that became effective in January 1977. It is a basic civil rights provision that prohibits discrimination against qualified handicapped individuals under any program receiving federal financial assistance. Therefore, it affects admissions, employment, and other treatment of qualified handicapped individuals at most institutions of higher education. The other statute is the Education For All Handicapped Children Act of 1975, Public Law 94–142.[4] It applies to all handicapped children, ages three through twenty-one, and requires access to appropriate education, development of individualized education programs (IEPs),

placement in the least restrictive environment, and due process in making decisions. It also provides methods of financial assistance to state and local governments.

Higher education institutions, obviously, will be affected more immediately by the requirements of the Rehabilitation Act, especially Sections 502 regarding architectural barriers, 503 regarding affirmative action in employment, and 504 regarding admission, than by the Handicapped Children Act.

The development of public policy regarding the education and employment of handicapped or disabled individuals has roots in legal theories relating to the concept of public schooling as a right rather than a privilege. For a long time, mentally handicapped children were excluded altogether from the opportunity for public schooling, though physically handicapped children sometimes were supplied public tutors at home. Then challenges to these practices began, on the theory that a public education is a right. In 1954, for example, in the landmark desegregation case, *Brown* v. *Board of Education*[5] this right was reconfirmed for non-handicapped children by the Supreme Court and was extended to include equal protection of the laws under the Fourteenth Amendment of the Constitution. In the *Brown* decision, which found racially separate education facilities inherently unequal, the Court stated:

> In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[6]

After the *Brown* decision, attempts were made in some instances to avoid actual desegregation by using methods to place students in apparently homogeneous ability groups for purposes of better teaching which, in fact, resulted in resegregating the student body. This also caused a degree of confusion of mental handicaps with educational or cultural handicaps. The latter are the result of economic disadvantage or failure to speak English as a primary language, rather than true mental retardation. Remedial education instead of special education would usually be appropriate in cases of economic or cultural disadvantage. Several cases illustrate this point.

For children mistakenly considered to be handicapped due to retarded mental ability, a legal breakthrough came in 1970 in *Diana* v. *California State Board of Education*[7] when the Court upheld the fundamental importance of accuracy in the assessment of children placed in classes for the educable mentally retarded (EMR). In California, Stanford-Binet IQ tests were individually administered in English to Mexican-American children. Their scores ranged between 68 and 52. However, when they were retested by a bilingual psychologist and permitted to answer in either English or Spanish, their scores increased an average of 15 points. Evidence was proffered in the complaint that the tests used, the Stanford-Binet and the WISC, had been standardized on white Anglo-Americans and were biased against Mexican-Americans. This case did not go to trial. A consent agreement was negotiated, stipulating that: (1) future testing of non-Anglo children for EMR placement should use both the child's primary language and English, (2) only certain tests or parts thereof could be used (that is, no vocabulary, general information, or other unfair verbal questions could be asked), and (3) state psychologists were to develop and standardize an IQ test appropriate for Mexican-American and other non-English-speaking Californians.

The *Diana* case was a turning point of sorts. Thereafter, at the state level, the California legislature acted to prevent over-reliance on IQ test scores to place children in EMR classes.[8] It passed legislation requiring that test scores had to be substantiated by other techniques, such as a complete evaluation of the child's developmental history, academic achievement, and family and cultural background. At the federal level, HEW issued a Memorandum, 35 Fed. Reg. 11,595 (1970), to the effect that schools throughout the U.S. should not assign non-English-speaking children to EMR classes on the basis of tests that measure English language skills. HEW pointed out that such a practice may violate Title VI of the Civil Rights Act of 1964.

In 1972 a similar decision was reached in *Guadalupe Organization Inc.* v. *Tempe Elementary School District*[9] in Arizona. There the court was able to assist the parties to the suit to reach a negotiated agreement. Students whose language was not English were placed mistakenly in classes for the mentally handicapped. The agreement provided that all such students would have their present placements re-evaluated. In the future, appropriate testing and examination would be administered to ensure that language and cultural factors would be taken into account in determining placement.

Two other significant judicial rulings came in 1972 in cases successfully challenging the exclusion of truly retarded children from public schools. In *Pennsylvania Association for Retarded Children (PARC)* v. *Commonwealth of Pennsylvania,*[10] children were tested and found to be "uneducable and untrainable." Their parents claimed that under the state law the children had a right to education, and under the Fourteenth Amendment that education should be available to them on the same basis as provided to other school children. A consent agreement was worked out which provided that the state could not apply any policy that would deny, postpone, or terminate access to a publicly supported education to mentally retarded children. It also provided that by September 1, 1972, every mentally retarded person between the ages of six and twenty-one years of age was to have access to a free public program of education and training appropriate to his or her learning capacities. A similar provision was made for preschool programs where they existed. The state was required to give notice and an opportunity for a hearing prior to a change in educational status of any child who was or was thought to be mentally retarded. Regular re-evaluation was required as well. The second case, *Mills* v. *Board of Education of the District of Columbia,*[11] resulted in a court order that all school age children, regardless of the severity of their mental handicaps, were entitled to an appropriate free public education. The courts, in these instances, found serious doubts as to the existence of a rational basis for excluding exceptional children from public schools.

Other cases brought on behalf of retarded children claimed violation of civil rights by denial of equal protection and due process based on an alleged failure by individual local school district officials and state officials to provide a suitable education to retarded children. For instance, in 1975, in *Fialkowski* v. *Shapp,*[12] retarded children were explicitly denied a public school education. They claimed they had been deprived of their civil rights. The case is significant because it alleged liability of four individual public officials under 42 U.S.C.A. Sec. 1983 in permitting such children to be excluded from school. The court held that two public officials were personally involved in the decision but that the other two were not. The court also ruled that monetary damages were not barred by the Eleventh Amendment, and that there was no absolute immunity defense in a civil rights action against governmental officials exercising discretionary authority. The case was sent back to the court for further action.

In *Lebanks* v. *Spears* (1976),[13] a court was asked again to rule in a case in which a mentally retarded child was excluded from attending public school. The court ruled that the child had a right to be admitted to school, in a decision similar to that in *PARC* and *Mills.* The court said that such a right leads to an extension that handicapped children have a right to an appropriate education, suited to their conditions and needs.

At least two cases should be mentioned that upheld the constitutionality of state laws which excluded certain classifications of children from public school. One case is *Cuyahoga County Association for Retarded Children and Adults* v. *Essex* (1976).[14] There the court upheld the exclusion of mentally handicapped school age children, deemed to be unable to profit substantially from further instruction by virtue of test scores. However, the court found certain state regulations constitutionally deficient in not containing proper provision for notice, availability for review of material used in the proposed classification, opportunity for input by persons affected, and guarantees that all relevant material would be at the disposal of the person charged with the responsibility for the final decision. The other notable case is *Taylor* v. *Maryland School for the Blind* (1976),[15] which held that a mentally handicapped blind child could be barred from attending a regular public school. Both of these cases upheld the exclusion of mentally

handicapped children from public school but emphasized the need for procedural safeguards.

Educational Negligence

When a normal child is misclassified as mentally retarded, may a claim of educational negligence be successful? One case says yes. An allegation of educational negligence was involved in a New York City public school case, *Hoffman* v. *The Board of Education of New York City* (1976),[16] which resulted in a jury award of $750,000 to a student who had been misclassified as retarded for the period of his entire elementary and secondary schooling. He was, in fact, of normal or slightly above normal intelligence.

The child had been evaluated by the school district in 1956–57 when he was six years old. As a result of that evaluation he was placed in EMR classes and never again evaluated until the beginning of the 1969–70 school year, when he applied for placement in an occupational training center run by the district. In the course of being evaluated for admission to the center, it was discovered that he was not mentally retarded at all. He was denied admission to the center. He sued the district for depriving him of twelve years of appropriate learning opportunity, the loss of earning capacity, and the private expenditures for services which the school should have provided.

The student charged the school district with negligence in hiring incompetent personnel, in incorrectly evaluating him and then neglecting to re-evaluate him, in failing to supervise personnel properly, in depriving him of speech therapy, and in misleading his mother as to his true intelligence. This suit was based upon the consideration that more rigorous standards of professional conduct apply in dealing with special education students than with those who remain in regular classes. A school board regulation required "competently administered" individual intelligence tests. The state education code required that the placement be evaluated by an accredited psychologist or psychiatrist. The trial court's instructions to the jury requested a finding of negligence if the jury found that a violation of the state code regarding mentally retarded children was a proximate cause of harm or injury to this plaintiff. The trial court defined educational negligence in special education in terms of the duty of care relating to the special training received regarding the teaching of mentally retarded children, rather than that relating to the training for teaching normal children. This case has been appealed by the school district, which suffered a jury award of $750,000 to the pupil, as noted at the outset.

Other educational negligence cases have been unsuccessful on appeal. They may be distinguished from the *Hoffman* case, though, by the fact that they involved normal students, not retarded students, so the standard of care required may be differentiated. One of these cases was *Peter Doe* v. *San Francisco Unified School District* (1976).[17] The parents of a student who graduated from high school with only a fifth-grade reading ability charged the school district with negligence. They claimed the school was negligent in not providing the student with basic reading and writing skills, thereby substantially limiting his future income. The matter of routine testing of students for competence in basic skills was not mentioned. The parents' claim failed because the court found no evidence of a direct causal link between the quality of teaching at the school and the student's lack of basic skills. The court said, "The achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers" (60 Cal. App. 3rd 814).

In 1977, a New York case, *Donahue* v. *Copiague Union Free School District*,[18] similar to the *Doe* case, was dismissed by the lower court. A year later, the dismissal was upheld by the New York Appellate Court.

Legislation Regarding Handicapped Elementary and Secondary School Students

Elementary and secondary school cases such as these led to state legislation further strengthening the principle of the right to education of disabled students. By 1972 it was reported that nearly 70 percent of the states had adopted mandatory legislation requiring the education of all children who have handicaps as defined in each state's

policies (Abeson, 1972).[19] By 1975 all but two state legislatures had adopted some form of mandatory law calling for the education of at least the majority of its handicapped children (U.S. Congress, Senate, 1975).[20] Today all but one state have enacted such legislation. Further, the Education Amendments of 1975, Public Law 93–380, required that states, in order to participate in the financial assistance available under the act, were to establish a goal of providing full educational opportunity to all children with handicaps (Abeson and Zettel, 1977).[21]

The culmination of these statutes and cases was passage of the Education for All Handicapped Children Act of 1975, Public Law 94–142.[22] As mentioned earlier, the act provides basic educational rights for handicapped children. Such rights include: the right to public education; the right to nondiscriminatory evaluation; the right to appropriate education by designing individualized education programs (IEPs) that place children in the least restrictive environment; and the right to due process of law, which means that detailed procedural safeguards are mandated to ensure full understanding by the family and the opportunity for review of the decision that a child is handicapped and requires a kind of placement. Handicapped children are defined as those who are "mentally retarded, hard of hearing, deaf, orthopedically impaired, other health impaired, speech impaired, visually handicapped, seriously emotionally disturbed, or children with specific learning disabilities who by reason thereof require special education and related services." Section 4, (a)(1). It is important to stress that the act contemplates that after a proper diagnosis and development of an IEP, it may be that some handicapped children will attend school without any program modification at all, though they may need special services.

It is inevitable that some children who have been educated at the elementary and secondary levels under conditions now possible due to legislation such as the Education for All Handicapped Children Act will seek admission to or employment by higher education institutions. What will be the responsibilities of higher education institutions in dealing with such individuals? The answer to that question may begin with a consideration of the recently implemented (1977) Rehabilitation Act of 1973, Public Law 93–112.

Legislation Affecting Handicapped Persons at All Educational Institutions

The Rehabilitation Act of 1973[23] essentially prohibits discrimination against otherwise qualified handicapped persons in programs or activities receiving federal financial assistance. A handicapped individual is defined as one who has a physical or mental impairment which substantially limits one or more of such person's major life activities. Persons handicapped by alcohol or drugs are covered by this act, but institutions may take into account their actual behavior in deciding whether to admit or hire them.

Title V of the Rehabilitation Act of 1973 contains several sections that affect higher education. Section 502, for example, authorized the establishment of the Architectural and Transportation Barriers Compliance Board, which is charged with enforcing the Architectural Barriers Act of 1968, Public Law 90–480, requiring that all buildings constructed in whole or in part with federal funds––as well as buildings owned or leased by federal agencies––have ramps, elevators, or other barrier-free access for persons who are blind, deaf, in wheelchairs, or otherwise disabled.

Section 503 requires that all federal contractors, such as universities, foundations, business firms, and other institutions holding contracts with the U.S. government, have affirmative action programs to hire and promote qualified handicapped persons.

Section 504 provides that:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance

Section 504 prohibits discrimination against qualified disabled persons, as employees, students, and receivers of health care and other services, in all public and private institutions receiving federal assistance. HEW regulations[24] provide for nondiscriminatory handling of handicapped individuals in higher education and vocational programs regarding student admissions, recruitment, treatment, adjustment of academic programs, housing, financial aid, employment assistance, nonacademic programs and services such as physical education, counseling, and placement.

The Department of Health, Education and Welfare (HEW) was to issue a set of standards for other governmental agencies to follow in drafting regulations. In addition, HEW issued its own regulations to administer the nondiscriminatory requirements of the Act for institutions receiving funds from HEW.

In general, the entire operation of educational institutions was affected by the Rehabilitation Act beginning June 3, 1977. Programs and structures were to be made accessible. Mainstreaming, or placing persons in the least restrictive environment--rather than a reliance on separate facilities--was to be used. The regulations do not require that every part of every building be accessible; rather, programs as a whole are to be accessible. Therefore, many institutions will be able to meet the requirements by reassigning classrooms or providing reasonable auxiliary aids. Nonstructural changes were to be made within sixty days. Structural changes were to be completed within three years--that is, by June 2, 1980. A specific person is to be designated to oversee compliance with the law, including affirmative action in employment practices under Section 503.

Preschool, Elementary and Secondary, and Adult Education

Each qualified handicapped child is entitled to a free appropriate education in the most normal setting possible, complete compliance with this requirement to be achieved by September 1, 1978. Evaluation procedures must be improved to avoid inappropriate education due to misclassification. Parents and guardians must be provided with due process procedures to resolve disputes over placement of students. State and local educational agencies are to locate and identify unserved handicapped children. If a handicapped student is so disruptive that education of other students in the classroom is impaired, the student can be reassigned. Transportation must be arranged to and from educational programs. If placement in a public or private residential program is necessary, the school district has responsibility for the costs of the program, nonmedical care, room and board, and transportation.

Postsecondary Education

Recruitment, admission, and treatment of qualified handicapped students must be free of discrimination. Tests, including admissions tests, must be selected and administered so that the test results of students with impaired sensory, manual, or speaking skills are not distorted unfairly. The director of the Office of Civil Rights of HEW has the burden of identifying alternate tests. Auxiliary aids, such as readers, tape recorders, and Braille material, must be provided. This often may be done by assisting students to seek aid from state vocational rehabilitation agencies and from private charitable organizations. Academic requirements must be modified reasonably to ensure full opportunity. For example, an extension of time to complete degree requirements may be appropriate. Rules prohibiting tape recorders in class or dog guides on campus should be modified. Physical education, infirmary services, housing, financial assistance, counseling, placement services, and social organizations all must be accessible as a whole to qualified handicapped students.

Employment Practices

Institutions are prohibited from discriminating in employment in recruiting, hiring, compensation, job assignment and classification, and fringe benefits. Employers must make reasonable accommodations unless to do so would be an undue hardship, based on business necessity and cost. Simple adjustments--modification of work schedules, use of ramps, and the shifting of some nonessential duties to other employees--are expected. Section 503 of the act requires

affirmative action, similar to that under the Vietnam Veterans Readjustment Act, to seek out, hire, and advance in employment handicapped persons.

The Office of Civil Rights of HEW will investigate complaints and seek voluntary compliance with the law. If no resolution results, a hearing will be held. Ultimately, financial aid may be suspended, terminated, or not granted to the institution.

A series of deadlines was issued to comply with the mandates of the act, as follows:

1. By June 3, 1977, institutions with fifteen or more employees must have designated a person to coordinate compliance efforts and to structure grievance procedures, including due process, for persons admitted or hired (but not for candidates for admission or employment).

2. After June 3, 1977, new facilities or parts thereof must be designed to be readily accessible to and usable by handicapped persons. They must meet design standards of the American National Standards Institute for minimal accessibility.

3. By July 5, 1977, institutions must have returned Assurance of Compliance form to HEW.

4. By August 2, 1977, institutions must function in existing facilities so that programs and activities, when viewed in their entirety, are readily accessible to handicapped persons.

   Education. Consortia for handicapped only are not permitted; admissions tests must be modified; financial assistance (athletic scholarships) may be denied; courses and exams (requirements), including physical education, to be accessible; counseling and placement to be accessible; classroom aids, aides (readers, interpreters), tapes, special facilities to be provided; housing, infirmary, and other services to be accessible.

   Employment. Employment tests and other selection criteria (medical exams), job restructuring, modified or part-time work schedules to be appropriate and accessible.

5. By September 2, 1977, participants, beneficiaries, applicants, employees, and unions or professional organizations having agreements with the institution must have been notified that the institution does not discriminate in admission or access to, or treatment or employment in, its programs and activities.

6. By December 2, 1977, the institution must have developed a transition plan for making all structural changes.

7. By June 2, 1978, the school must complete a self-evaluation of its policies and procedures, in consultation with handicapped persons.

8. By September 1, 1978, all public preschool, elementary, secondary, and adult education schools are to provide each qualified handicapped student a free appropriate education.

9. By June 2, 1980, all structural modifications, including housing, must be complete.

A Brief Review of Cases Involving Handicapped Persons, Relevant to Higher Education Institutions

There are only a few significant education and employment cases at the present time to provide legal guidance to higher education institutions in meeting the requirements of the Rehabilitation Act. Two Supreme Court decisions, one regarding admissions and the other employment, are helpful in beginning the process of judicial interpretation of the education and employment rights of handicapped persons. They are *Southeastern Community College* v. *Davis*,[25] decided June 11, 1979, and *New York City Transit Authority* v. *Beazer*,[26] decided March 21, 1979.

The *Davis* Case Regarding Admission

Southeastern Community College v. *Davis* was viewed by the Supreme Court as raising a relatively narrow question: "Whether Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an 'otherwise qualified handicapped individual' in federally funded programs 'solely by reason of his handicap' forbids professional schools from imposing physical qualifications for admission to their clinical training programs" (47 LW at 4690). The Supreme Court held that "there was no violation of Section 504 when Southeastern concluded that (Davis) did not qualify for admission to its program" (47 LW at 4693).

The facts in the *Davis* case began with Davis seeking admission to Southeastern's program leading to eligibility for certification as a registered nurse. During an admissions interview it became apparent that Davis had a serious hearing disability. Following Southeastern's advice, Davis was examined by an audiologist at Duke University Medical Center and was diagnosed as having a bilateral sensori-neural hearing loss. A change in her hearing aid was recommended, but even with the new hearing aid she was not able to understand normal spoken speech. She relied on being able to lipread. Southeastern transmitted the audiologist's report to the executive director of the North Carolina Board of Nursing, who recommended that Davis not be admitted to the nursing program. This decision was based on a conclusion that Davis's hearing disability would make it unsafe for her to practice as a registered nurse, that it would be impossible for her to participate safely in the clinical program, and that the kinds of modifications in the program necessary for Davis would not permit her to get sufficient training to qualify for certification. It was thought also that Davis would not be able to practice the profession of nursing safely. Davis responded that these reasons were inadequate because she already was licensed as a practical nurse. However, evidence demonstrated that Davis, in fact, had done very little practical nursing, and then only night duty several years before applying to Southeastern.

Davis was notified that she was not qualified for admission, and she asked for reconsideration of the decision. Southeastern's entire nursing staff was convened, facts, reports, and the recommendation of the executive director of the Board of Nursing were discussed, and the staff voted to deny Davis admission.

Davis then filed suit alleging a violation of Section 504 of the Rehabilitation Act of 1973, and a denial of equal protection and due process. The trial court found in favor of Southeastern, agreed that there was sufficient evidence to conclude that Davis would have to rely on lipreading, that this was not safe in many situations such as when it was necessary that surgical masks be worn, and that her hearing disability would prevent her from safely performing in the training program and in the profession of nursing. In essence, the trial court found that Davis was not an "otherwise qualified" handicapped individual protected by Section 504. The court said that "otherwise qualified" meant able to function sufficiently in the position sought *in spite of* the handicap, not *without regard* to it. The trial court held that the decision not to admit her did not violate Section 504 and dismissed the constitutional claims she had raised.

The court of appeals reversed the trial court. It agreed with the findings of fact, but held that the trial court had misconstrued Section 504. The appellate court believed that new regulations required Southeastern to consider applications from handicapped persons without regard to their handicaps so long as they were otherwise academically and technically qualified.

The Supreme Court reversed the appeals court and upheld the trial court. The Supreme Court began by saying that Section 504 makes mere possession of a handicap an impermissible ground for assuming an inability to function in a particular context. However, Section 504 does not compel educational institutions to disregard the handicap or to make substantial modifications in their programs. The Supreme Court agreed with the trial court that an otherwise qualified person is one who is able to meet all of a program's requirements *in spite of* his handicap. The Court pointed out that HEW's regulations support interpretation of the need for otherwise qualified handicapped persons to meet academic and

technical standards to include meeting legitimate physical qualifications.

The Supreme Court then took up the question of whether the physical qualifications demanded by Southeastern for admission to its nursing program were necessary. It found that they were. The Court said that there was no question that the ability to understand speech without lipreading was necessary for patient safety during clinical training, and agreed with the trial court that this ability was necessary, too, for functioning as a registered nurse.

Davis then took the position that Southeastern was required by the HEW regulations to modify its nursing program to make oral communication unnecessary. Specifically, Davis asked for individual supervision and dispensation from some required courses. She claimed she should be permitted to take only the academic courses and be excused from the clinical ones. The Supreme Court found that the HEW regulations[27] specifically excluded personal, individual services from the kinds of auxiliary aids a school must provide. It found also that the HEW regulations regarding modification of programs[28] did not mean such a drastic modification that Davis would not be at all prepared to meet the state certification requirements for registered nurses.

The Court emphasized that Section 504 does not provide for affirmative action. Only Section 503, dealing with employment of handicapped persons by federal contractors, mentions affirmative action. Therefore, under Section 504 and for purposes of the admission of students, the kinds of steps appropriate under affirmative action concepts are not contemplated.

The Supreme Court noted that situations may arise where a refusal to modify an existing program might be unreasonable and discriminatory, particularly where no undue financial and administrative burdens are imposed on a state.

In the *Davis* case, the Supreme Court found that Davis could not participate in Southeastern's nursing program unless the standards were substantially lowered. This the Court found not required by Section 504. The Court said:

> Nothing in the language or history of Section 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program. Nor has there been any showing in this case that any action short of a substantial change in Southeastern's program would render unreasonable the qualifications it imposed. 47 LW 4693.

What Does *Davis* Tell Us . . . and Not Tell Us?

1. *Davis* tells us about qualifications for admission to a higher education professional clinical training program.

2. It says that reasonable physical qualifications may be required, which leads to an inference that the HEW regulations prohibiting questions about physical disabilities prior to admission may be invalid regarding admission to clinical training programs.

3. It says that an otherwise qualified handicapped person is one who is academically and technically qualified *in spite of* the handicap, not without regard to it.

4. It says that professional clinical training programs need not be so substantially modified that they no longer serve their original purpose of training for a profession.

On the other hand,

5. *Davis* does not tell us about qualifications for admission to liberal arts, science, or other nonprofessional clinical training programs.

6. It does not tell us whether there are other instances where reasonable physical qualifications may be required.

7. It does not tell us what kinds of auxiliary aids and services may be required.

8. It does not tell us what constitutes unreasonable modification of programs other than clinical training programs.

9. It does not tell us whether Davis or any other complainant has a private right of action under Section 504 prior to exhausting administrative remedies.

The *Beazer* Case Regarding Employment

New York City Transit Authority v. *Beazer*[29] was a Supreme Court decision regarding general rule of the Transit Authority (TA) denying employment in operational subway and bus jobs to all narcotics users, including those on methadone as part of a drug rehabilitation program, on the grounds of safety. This case did not involve the Rehabilitation Act because the relevant regulations were passed after the TA's action took place. Instead, the suit was based on an alleged violation of the Equal Protection Clause of the 14th Amendment and of Title VII of the Civil Rights Act of 1964.[30] The Supreme Court found in favor of the employer on what amounted to legal technicalities having to do with the lack of statistical proof that such a rule violated either the Equal Protection Clause of the 14th Amendment or Title VII relative to its effect on blacks or Hispanics. There was an inference that had the Rehabilitation Act regulations been applicable, the Court still would have found in favor of the rule. The reason given was that, in all likelihood, "job-relatedness" of the rule easily would have been demonstrable.

In June 1979 the Supreme Court refused to review an appellate court ruling in *Trageser* v. *Libbie Rehabilitation Center.*[31] This case involved Section 504's prohibition against employment discrimination of otherwise qualified handicapped persons. The case involved a nurse who was fired because of failing eyesight. The employer was a rehabilitation center which received federal funds in the form of Social Security payments and Veterans Administration benefits. The appellate court had ruled that under the 1978 amendment to the Rehabilitation Act of 1973,[32] Section 504 implied that a private citizen is entitled to bring suit only when a primary objective of the federal financial assistance is to provide employment. The Supreme Court now in effect has agreed with this interpretation, which is in line with interpretations of Title VI of the 1964 Civil Rights Act[33] and Title IX of the Education Amendments of 1972.[34] This decision may have a substantial effect on the availability of private employment suits as a remedy under Section 504. Administrative remedies still exist, of course.

Miscellaneous Cases and Questions

It is too soon to be able to generalize regarding legal rights of otherwise qualified handicapped individuals. Indeed, it may never be possible to do so. This may be an area of law which will proceed almost indefinitely on a case-by-case basis. Rights provided by federal and state laws will have to be interpreted in light of specific personal disabilities measured against the specific abilities required to meet the standards or criteria for various educational programs or jobs.

At present, there are clusters of cases around some issues. It may be helpful to mention some of these.

Issue: Pre-admission inquiries about handicaps.

Comment: Section 504 regulations do not permit pre-admission inquiries; yet the *Davis*[35] case seems to negate this rule, at least if the inquiries are functional to determine an applicant's ability to meet the essential requirements of a particular degree program. This would be similar to the pre-employment questions permitted under Regulation 84.14 (a).

Issue: Obligation to supply interpreters for the deaf in nonprofessional, nonclinical programs.

Comment: There is no clear answer to this question, either. The HEW regulations require post-secondary institutions to provide auxiliary aids, including interpretive services, but there is a specific exemption from having to provide "personal services" [84.44 (d) (2)]. Two earlier cases, *Barnes* v. *Converse College*[36] and *Crawford* v. *University of North Carolina,*[37] involved deaf graduate students who were employed as teachers in local schools and who were upgrading their educations for purposes of professional advancement. In both cases the courts ordered preliminary injunctions. The institutions were to provide interpreters, but the two students were to post several thousand dollars bond to cover costs should it be decided later that they were not entitled to the services free of charge. In the

Barnes case, the court later found that the student had not exhausted all administrative remedies before filing suit.

Issue: Must administrative remedies be exhausted before a private suit may be filed?

Comment: The Supreme Court in *Davis* chose not to deal with this question. Appellate and lower court cases divide on this issue. However, the Supreme Court in another civil rights case, *Cannon v. University of Chicago*,[38] did say that the language of Title IX of the Education Amendments of 1972[39] implicitly created a private right of action for sex discrimination. It remains to be seen whether the Supreme Court will interpret Section 504 in similar fashion.

Issue: Delays in providing access to education and jobs as required by the regulations.

Comment: A spate of cases involving delays at the elementary and secondary school levels, relating to federal and state statutes, appears to indicate that courts are beginning to lose patience with laggard institutions. For example, *Panitch* v. *State of Wisconsin* (1978)[40] was a case in which the judge pointed out that, while the case had been begun in 1972 and Wisconsin had passed its own handicapped statute in 1973, at the end of 1977 a significant portion of the state's handicapped children had not yet been identified, much less placed and given an appropriate education. The court ordered the state to provide the required special education and to submit regular reports on its progress.

Issue: Are successful plaintiffs who file suit under Section 504, a civil rights provision, entitled to attorney's fees?

Comment: The 1978 Amendments to the Rehabilitation Act, Public Law 95–602, signed November 6, 1978,[41] allow, at the court's discretion, the awarding of attorney's fees to the prevailing party (except the U.S. Government) in discrimination cases.

Issue: Personal liability for violation of Section 504.

Comment: Personal liability is possible. In *Howard* v. *Friendswood Independent School District* (FISD) in 1978,[42] a federal district court judge said, "This Court has concluded that the Board of Trustees of FISD has received extremely poor advice concerning its legal obligations and the possible liability of individual administrators and Trustees for intentional violation of plaintiffs' constitutional right. In this connection, the attention of the Board of Trustees is respectfully directed to the possibility of personal liability being imposed upon school board members for failure to comply with their obligations." This case follows the 1975 precedent of *Wood* v. *Strickland*[43] which held that school board members may be personally liable for actions they knew or should have known would deprive persons of constitutional rights.

Prognosis

Access to educational programs and jobs is the goal of federal and state statutes regarding the handicapped. Institutions that make reasonable and good faith efforts to meet the specific requirements relating to architectural barriers, affirmative action in employment, and nondiscrimination should have few legal problems. Courts have indicated that they still support their traditional stance that educators are the proper parties to set educational standards and to solve educational problems. However, where educators fail to accept this responsibility, the courts will have no option but to intervene. Reasonable accommodations and modifications in programs and buildings should suffice in most cases, but specific instances of disagreement over whether a particular disability disqualifies a person for a particular program or job will arise despite the best of intentions. Areas of likely disputes are admission to professional programs, athletics, housing, social organizations, counseling, placement, funding, and exhaustion of administrative remedies.

Anticipating troublesome issues and developing a carefully thought-out position on as many of them as possible should be very beneficial. For example, the American Association of Medical Colleges appointed a Special Advisory Panel in March 1978 to recommend guidelines for the development of technical (nonacademic) standards for use in the medical school admissions process. The AAMC

notes that the guidelines, distributed to medical colleges in early 1979, are not guaranteed to protect schools from challenge by disappointed applicants; but they do reflect the conclusion of the Advisory Panel and the Executive Council of AAMC that there are certain minimum standards for physicians that must be examined and enforced in the admissions process.

The work of providing access for otherwise qualified handicapped persons to education and jobs is just beginning. Over time, a body of cases should develop to provide guidance for educators. Whether these cases will be helpful or not will depend in large part on how well educators handle matters at their own institutions so that only a few, really tough questions are left for courts to decide.

NOTES

1. *Southeastern Community College* v. *Davis*, 47 LW 4689 (June 11, 1979).

2. Rehabilitation Act of 1973, Public Law 93–112, 29 U.S.C. 794 (1973). Title V was amended Nov. 6, 1978, Public Law 95–602.

3. 47 LW 4693 (1979).

4. Education For All Handicapped Children Act of 1975, Public Law 94–142, 20 U.S.C. 1401.

5. *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954).

6. Ibid.

7. *Diana* v. *California State Board of Education*, Civil No. C–70–37 RFR (N.D. Cal. Jan. 7, 1970 and June 18, 1973).

8. 1970 Cal. Stats. Chap. 1543; Cal. Educ. Code, Sec. 54504.

9. *Guadalupe Organization Inc.* v. *Tempe Elementary School District*, Civ. Act. No. 71–435 (D. Ariz. 1972).

10. *Pennsylvania Association for Retarded Children (PARC)* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972).

11. *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972).

12. *Fialkowski* v. *Shapp*, 405 F. Supp. 946 (E.D. Pa. 1975).

13. *Lebanks* v. *Spears*, 417 F. Supp. 169 (E.D. La. 1976).

14. *Cuyahoga County Association for Retarded Children and Adults* v. *Essex*, 411 F. Supp. 46 (N.D. Ohio 1976).

15. *Taylor* v. *Maryland School for the Blind*, 409 F. Supp. 148 (D. Md. 1976); affirmed 542 F. 2d 1169 (4th Cir. 1976).

16. *Hoffman* v. *Board of Education of City of New York*, 410 N.Y.S. 2d 99 (1978).

17. *Peter Doe* v. *San Francisco Unified School District*, 60 Cal. App. 3rd 814 (1976).

18. *Donohue* v. *Copiague Union Free School District*, Index No. 77–1128, Superior Court, Suffolk County, New York (Aug. 11, 1977); affirmed 408 N.Y.S. 2d 584, 47 LW 2096 (App. Div. 1978).

19. Abeson, A. "Movement and Momentum: Government and the Education of Handicapped Children." 39 *Exceptional Children* 63, 1972.

20. U. S. Congress, Senate, Education For All Handicapped Children Act, S.6., 94th Congress, 1st Session, June 2, 1975. Report No. 94–168.

21. A. Abeson and J. Zettel, "The End of the Quiet Revolution: The Education for All Handicapped Children Act of 1975." In *Exceptional Children,* October 1977.

22. See note 4.

23. See note 2.

24. HEW regulations to implement Section 504 were published in the *Federal Register,* May 4, 1977, Vol. 42, No. 86, pp. 22677–22685.

25. See note 1.

26. *New York City Transit Authority* v. *Beazer,* 99 S. Ct. 1355, 47 LW 4291 (March 21, 1979).

27. HEW 504 Regulation 84.44 (d) (2).

28. HEW 504 Regulation 84.44 (a).

29. See note 26.

30. Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000 (e). As amended by the Equal Employment Opportunity Act of 1972. Procedural regulations appear at 29 C.F.R. Part 1601.

31. *Trageser* v. *Libbie Rehabilitation Center,* 590 F. 2d 87 (1978); cert. denied, 47 LW_____ (1979).

32. See note 2.

33. Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000 (d).

34. Title IX of the Education Amendments of 1972, 20 U.S.C. Sec. 1681. Regulations appear at 45 C.F.R. Part 86 (1975). Amended 1976.

35. See note 1.

36. *Barnes* v. *Converse,* 436 F. Supp. 635 (D.S.C. 1977); dismissed 1978.

37. *Crawford* v. *University of North Carolina,* 440 F. Supp. 1047 (D.M.D. N.C. Durham Div. 1977).

38. *Cannon* v. *University of Chicago,* 47 LW 4549 (May 14, 1979).

39. See note 34.

40. *Panitch* v. *State of Wisconsin,* 390 F. Supp. 611 (D.E.D. Wisc. 1974); 444 F. Supp. 320 (D.E.D. Wisc. 1977); 451 F. Supp. 132 (D.E.D. Wisc. 1978).

41. See note 2.

42. *Howard* v. *Friendswood Independent School District,* 454 F. Supp. 634 (D.S.D. Tex. 1978).

43. *Wood* v. *Strickland,* 420 U.S. 308, 95 S. Ct. 992 (1975).

SELECTED PUBLICATIONS

"Selected Federal Publications Concerning the Handicapped" (OHDS) 79–22005

Order from: U. S. Dept. HEW, Office of Human Dev. Services, Office for Handicapped Individuals, Washington, DC 20201

"Guide to the Section 504 Self-Evaluation for Colleges and Universities" 1978

Order from: Natl. Assn. of College and University Business Officers (NACUBO), One Dupont Circle, Suite 510, Washington, DC 20036

"Recruitment, Admissions, and Handicapped Students" 1978, Publication of AACRAO and ACE

Order from: James D. Bennett, Director, Technical Assistance Unit, Office of Program Review and Assistance, 330 Independence Ave., SW, Washington, DC 20201

"Architectural Accessibility for the Disabled of College Campuses" October 1976

Order from: Architectural and Transportation Barriers Compliance Board, Room 1014, HEW Switzer Bldg., 330 C St., SW, Washington, DC 20201

"Architectural Checklist: Making Colleges and Universities Accessible to Handicapped Students"

Order from: President's Committee on Employment of the Handicapped, 1111 20th St. NW, Rm. 606, Washington, DC 20210

Personal Liability of Administrators: A New Emphasis

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The albatross of public administrators today is the specter of personal liability for their official acts. The possibility of being sued for an error in judgment influences each decision of every thoughtful administrator. These public servants find themselves as targets for lawsuits based upon almost every segment of the law. It is no wonder then that there must be a new emphasis on the matter of personal liability of such decision makers. I submit that absolute official immunity for judgmental decisions made in good faith is the answer. Let us then begin this discussion by examining the historical development of the so-called immunities available to all classes of public administrators.

Background--Sovereign Immunity

The concept of sovereign immunity was popularly expressed in England, from whence our law is derived, as the legal axiom that "the King can do no wrong." This expression, at least in its legal sense, was never intended to mean that the king could not be wicked, or that in life or in conception he was immaculate. The concept was one which was highly technical. It meant that as sovereign the king's person was not subject to the jurisdiction of his own courts because jurisdiction implies superiority of power. In other words, the crown could not be sovereign and still be subject to any higher authority on earth. It is from this concept of sovereign immunity that the doctrine of official immunity evolved.

At the time the former colonies of North America became independent states it would, of course, have been entirely possible for them to have abolished the doctrine of sovereign immunity. Adopting a republican form of government, there no longer was any king or other individual possessed of personal sovereignty. Under the new theory it was "the people" who were sovereign. While abolition of the doctrine was possible, however, it did not follow. The immunity of the person of the king was transferred from the king to that corporate political body known as "the state" where, although subjected to increasing attacks over the years, we see it still.

The important thing to remember about sovereign immunity, as a matter introductory to the doctrine of official immunity, is that this crown prerogative of immunity was strictly personal. In England, it related to the lack of any court's jurisdiction over the person of the king; and where it exists in our country today, it pertains to the same lack of jurisdiction over the "person" of the state. The distinction between the doctrine of sovereign and official immunity is rather important. As we shall see, official immunity, unlike sovereign immunity, has come to concern itself largely with a person's function--as opposed to any personal attribute of the individual himself.

As a personal immunity--and by this I mean personal to the king as sovereign--sovereign immunity did not rub off on the king's ministers and officials. Below the king, all officials and ministers were as subject to suit as was any other citizen. Hence, the same English courts which jealously guarded the personal immunity of the crown from suit held all manner of high-ranking officials, including lords of the admiralty, secretaries of state, postmasters general, commissioners of income tax, and others, to be

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amenable to actions across the complete spectrum of torts including simple negligence.

In general, the same could be said to have been true of the hazards of being a public official in the newly-independent United States. In 1799, we were engaged in what was virtually an undeclared war at sea with France. The Congress passed a law authorizing the interception of certain vessels bound for French ports. In issuing implementing orders, the President of the United States did what federal regulators have done ever since; he went considerably beyond what the statute authorized. He instructed shipowners to intercept ships coming from as well as going to French ports. Acting under the order from his commanding chief, one Captain Little, in command of a frigate, took a Danish ship as a prize. Upon being sued, he relied upon the defense that he was a naval officer following orders. Unfortunately, his defense was no more successful than was the same defense in the criminal prosecutions at Nuremberg 150 years later. The Supreme Court of the United States held that the instructions of the president, being legally erroneous, could not legalize an act which in their absence would obviously have been a trespass. See *Little* v. *Barreme*, 6 U.S. (2 Cranch) 157 (1804). Another ship captain, whose reading habits did not include Supreme Court decisions, was similarly held liable in tort for his seizure of a vessel in 1808 (in a misguided exercise of what he thought were the customs laws of the United States) even though he had acted on direct instructions from the Secretary of the Treasury which had been confirmed by the President of the United States *Otis* v. *Bacon*, 11 U.S. (7 Cranch) 589 (1813).

In other words, at common law, there was, generally speaking, no such thing as official immunity. The general rule with certain exceptions was that a public official was as suable as anyone else. This is generally true today, since the more usual judicial approach to official immunity is not one beginning with the bar of the doctrine and then seeing if an exception or limitation applies to permit the action against the official but, rather, in most jurisdictions is one of beginning with a presumption of liability and then seeing if the action falls within one of the exceptions to the general existence of the right to sue. As one court said: "[w]e start with the premise that a governmental officer like any other person is liable at common law for his torts, even if they are committed within the scope of his employment." See *Carter* v. *Carlson*, 447 F.2d 358, 361 (D.C. Cir. 1971).

Development of the Doctrine of Official Immunity

How then did the fuzzy doctrine of official immunity, particularly as it may be available as a defense to public administrators, come about? Once again, it seems useful to start by looking at public officials other than those with whom we are most directly concerned (*i.e.*, governmental administrators and executives). The utility of doing so stems from the fact that it is from the immunities of certain rather narrow categories of public officials that immunities from suit, such as they are, have developed for public administrative and executive officers.

Legislative Immunity

One well-known immunity from suit concerning public officials is that which is enjoyed by legislators. The origin of this legislative immunity dates back to the English civil wars of the 17th century, which pitted what appears to me to be a conglomeration of Protestant religious fanatics, supporters of Parliament, and others (collectively known as the Roundheads) against the supporters of the crown and established Church (this side being historically and romantically referred to as the Cavaliers). The Stuart kings, whose virtues did not always include moderation and patience, took offense at some incendiary things being said about the crown in Parliament and had some members prosecuted for their seditious speeches. This led to Parliament's enacting an early civil rights act to protect its members. As summarized by the Supreme Court of the United States in *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951):

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the

> Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim . . . . In 1668, after a long and bitter struggle, Parliament laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament . . . . In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

The English Bill of Rights of 1689 was in essence incorporated into Article I, §6 of our federal Constitution, which provides that members of the Congress shall not be questioned in any place other than within Congress for speech or debates there, and that in all cases except treason, felony, and breach of peace, members shall be privileged from arrest during their attendance at sessions of their respective houses. The same constitutional immunity of legislators is contained in most state constitutions, including Article III, Section VI, Paragraph XII of the Constitution of the State of Georgia of 1976 (Ga. Code Ann. §2–1112).

Tenney v. *Brandhove, supra,* involved a modern civil rights action against a state fact-finding legislative committee on un-American activities after it had cited the plaintiff for contempt. The plaintiff had alleged that the committee hearing was not for any legitimate legislative purpose but, rather, was designed to intimidate and silence his criticism of the committee and was malicious. The Supreme Court concluded, however, that while the civil rights legislation by its terms made deprivations of federally guaranteed rights under color of state law actionable, it was not the intent of Congress in enacting this legislation to terminate the long standing and almost universal immunity of state legislators.

Judicial Immunity

A second type of immunity which is available to members of a narrow and extremely favored class of public officials is of even more ancient vintage than that available to legislators. This is the doctrine of judicial immunity which seems to have been quite well settled by the very start of the 17th century. Coke spoke of a case in 1608 as conferring complete immunity upon judges respecting their official actions even in the face of allegations of corruption, bad faith, and maliciousness. Unlike legislative immunity, which was created by statute and is currently incorporated in our federal and state constitutions, the doctrine of judicial immunity is a judicially created doctrine (i.e., judges acting to protect judges).

The rationale of the doctrine of judicial immunity, which is to say that a judge cannot be liable for a judicial action performed within the jurisdiction of his court, was succinctly stated by the Supreme Court of the United States in *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335, 347 (1871), as follows:

> . . . it is a general principle of the highest importance to the proper administration of justice that a judicial officer, exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself . . . .
>
> The principle . . . which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their *judicial functions,* obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries . . . . (Emphasis supplied.)

As with legislative immunity, this Supreme Court currently holds that judicial immunity has in no way been watered down by the civil rights legislation which in general authorizes actions against public officials who acting under the color of law deprive someone of federally protected rights. See, *e.g., Stump* v. *Sparkman,* 435 U.S. 349, 365 (1978) (Stewart, J., dissenting), and *Pierson* v. *Ray,* 386 U.S. 547 (1967).

The recent decision of the Supreme Court in *Stump* v. *Sparkman, supra,* is particularly interesting. The case involved a situation of a young girl who was sterilized at her mother's request upon a petition signed by a judge, without

the girl's knowledge or approval. The United States District Court held that Judge Stump, although his approval of the petition may have been based upon an erroneous view of the law, did have jurisdiction to consider and act upon the petition and hence was entitled to judicial immunity. On appeal, the 7th Circuit held that the critical issue was whether Judge Stump acted within his jurisdiction. The court of appeals concluded that he had not and, hence, reversed.

The Supreme Court of the United States reversed the circuit court. Citing *Bradley* v. *Fisher, supra,* the Court said:

> A judge will not be deprived of immunity because the action he took was in error or done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction". (435 U.S. at 356–357.)

In determining whether the act or function complained of is judicial, the Supreme Court said one should look to the nature of the act or function, *i.e.*, whether it is a function normally performed by a judge and whether the parties were dealing with the judge in his judicial capacity. 435 U.S. at 362.

Official Immunity

As previously discussed, the king's immunity as the sovereign was personal and did not rub off upon his ministers or other subordinate administrative officials. As our country began its independent journey, the situation was much the same here. The sovereign immunity of the newly-created states and of the United States did not in general inure to the benefit of governmental administrative officials––as the ship captains in *Little* v. *Barreme, supra,* and *Otis* v. *Bacon, supra,* found to their dismay. While, as we have seen from the start, judges have been protected by judicial immunity and legislators have been protected by legislative immunity, members of the third branch of government, the executive, had no like protection when our nation first came into existence. There was, in other words, no doctrine or defense of official immunity at all for the protection of public administrators.

However, it soon became obvious that the very functioning of government itself could be jeopardized if every decision were subject to needless litigation, and if every decider were to be subject to intimidation in the making of policy decisions, through the specter of personal liability. Some executive policy decisions, such as the granting or withholding of licenses, appointments, etc., were perceived as involving a decisional process, based upon judgment and discretion, which were remarkably similar to the kinds of decisions made by judges within the realm of their judicial immunity. Hence, through case law, a doctrine developed to the effect that certain high-ranking public officials, who make top-level-policy decisions involving judgment and discretion (the president, governors, cabinet-level ministers, etc.) now have the same sort of absolute immunity as to their official decisions that judges have so long enjoyed under the doctrine of judicial immunity. These officials, charged with the duty of using independent judgment in making important policy decisions (regardless of bad faith, malice, or coruption), were contrasted sharply with mere ministerial officials (or employees), who had no immunity, official or otherwise, from suit or personal liability as a consequence of their decisions, even if made in absolute good faith. See R. Gray, *Private Wrongs of Public Servants,* 47 Cal. L. Rev. 303, 322 (1959), and *Greenfield* v. *Vesella,* 457 F.Supp. 316 (W.D. Pa. 1978).

An illustrative decision of this doctrine of absolute immunity of high-ranking governmental officials is *Kendall* v. *Stokes,* 44 U.S. (3 How.) 87 (1845). In that case certain plaintiffs had alleged that the postmaster general had "wrongfully, illegally, maliciously and oppressively suspended items of account upon which plaintiffs had made payment." After a jury verdict for the plaintiffs in the amount of $11,000, the Supreme Court of the United States reversed and observed:

> We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his judgment and from a sense of duty . . . has been held liable to an action for an error in judgment.
>
> . . . a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial

> one, but is one in relation to which it is his duty to exercise judgment and discretion; even though an individual may suffer by his mistake. (44 U.S. at 97–98.)

Some years later in *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896), the Court expressly likened the absolute immunity of the heads of executive departments to that of judges engaged in the performance of the duties of their offices.

Initially, lower-ranking public officials and employees of the executive branch of government had, as we have seen, no immunity at all. It has always been the law, for example, that in the absence of statutory exceptions relating to such emergencies as the hot pursuit of law violators, police officers have no immunity from the operation of normal traffic laws while performing their official duties, or from personal liability in tort actions based upon their negligent operation of their motor vehicles while engaged in hot pursuit or otherwise exercising their duties and responsibilities. Indeed the only protection police have traditionally had is a certain degree of "rub off" from the judicial immunity doctrine. To the extent that he is exercising his duties of executing judicial process or court orders, a policeman is protected from civil liability (even though his task is ministerial rather than discretionary)—but only if he acts in good faith and without malice. 67 C.J.S. Officers §206. As stated in the comparatively recent case of *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967):

> The common law has never granted police officers an absolute and unqualified immunity . . . . [They must show] they acted in good faith and with probable cause in making an arrest under a statute they believed to be valid. (Bracketed matter added.)

One source of confusion about the doctrine of official immunity has been the simultaneous development of concepts of absolute and qualified immunity for public administrators and executive officials. Looking first at the absolute immunity approach, previously noted in connection with judges and high-ranking governmental officials who were sometimes indeed referred to as discretionary officials, the Supreme Court of the United States made this defense available to a vastly broadened class of federal officials when in *Barr* v. *Matteo*, 360 U.S. 564 (1959), a majority of the Court concluded (over four dissents) that the immunity of federal officers was not to turn upon the position held (*i.e.*, high executive office) but upon the function performed by the officials.

In *Barr* v. *Matteo*, the acting director of the Office of Rent Stabilization was sued for libel (with malice alleged) by certain of his subordinates. At issue was a press release of the defendant. A jury returned a verdict for plaintiffs and the defendant appealed on the ground of absolute privilege. The court of appeals affirmed the jury verdict upon the ground that the acting director, in explaining his decision to suspend plaintiffs to the general public, went outside of his general duties and, hence, no privilege existed. The Supreme Court reversed upon the ground that an offical should not be under apprehension of his motives *or* his errors of judgment becoming the subject of inquiry in a civil suit for damages. The Court concluded that the immunity was not a badge of rank or position but a policy to aid in the effective functioning of government. 362 U.S. at 572–73. The Court went on to conclude that it could not be said that the publication of the press release by the defendant public administrator was not an appropriate exercise of discretion with respect to his particular rank. *Id.* at 574. Similarly, in *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 658 (2nd Cir. 1962), a court, in following *Barr* v. *Matteo*, said that:

> . . . officials of the federal government are not personally liable for alleged torts based upon acts, done within the scope of their duties, which necessarily involved the exercise of a judgment or discretion which public policy requires be made without fear of personal liability.

The Fifth Circuit, in *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965), dealt with a suit against subordinate Justice Department officials based upon alleged maliciousness in making an arrest without probable cause. In holding that the action could not be maintained, the Fifth Circuit explained:

> As to judicial, legislative, and executive officers, the test to determine the existence of immunity from suits from monetary recovery based on allegedly wrongful conduct is whether or not the officers were acting within the scope of their authority or in the discharge of their duties . . . .
>
> [In *Barr* v. *Matteo*], the Supreme Court clearly indicated that allegations of malice are not sufficient to prevent the application of executive immunity . . . . The act must have more or less connection with general matters committed by law to the officers control or supervision, and by not manifestly or palpably beyond his authority . . . .
>
> *Barr* v. *Matteo, supra*, . . . also held that the rank of the officer, in itself, does not determine the applicability of the doctrine. (332 F.2d 857–859.)

This view of official immunity as an absolute defense continues to have vitality in some situations in some jurisdictions. See *Greenfield* v. *Vesella, supra.* The critical question in such situations is whether the precise function in question was ministerial or discretionary. See *Carter* v. *Carlson*, 447 F.2d 358, 362 (D.C. Cir. 1971).

On the other hand, other jurisdictions, although also engaged in expanding the shield of official immunity at the same time, instead of making the absolute defense of high-ranking officials available to those of lower status, opted for the expansion of the limited, qualified, or good faith view of official immunity traditionally available to police officers executing judicial process or orders to other governmental officials and employees. Under this second view, these less exalted public officials have but a qualified immunity which applies to their exercise of their discretionary functions within the scope of their official duties when they are not acting maliciously or in bad faith. 67 C.J.S. Officers §308. Georgia, for example, appears to be numbered among the states taking this approach. As stated in *Hodges* v. *Youmans*, 129 Ga. App. 481, 484 (1973):

> . . . an official is not immune from liability if he is not acting in good faith, or beyond the scope of his duties, or commits acts not authorized by law; or acts maliciously or wantonly with intent to injure the property of another; or where the power of the officer is being manifestly abused to the oppression of the citizen.

See also *Vickers* v. *Motte*, 109 Ga. App. 615, 617 (1964)––also pointing out that maliciousness means more than mere willful doing of an act, requiring in addition an element of hatred or ill will, or of such other wrecklessness as denotes a corrupt or benevolent disposition. In light of *Hodges* and *Vickers*, in other words, it seems open to question whether any executive official, from the governor on down, possesses an absolute immunity from suit or liability *in Georgia.*

Whether viewed as absolute or qualified, one recurring problem in connection with official immunity has been the judicial line drawn between discretionary functions (where the immunity applies) and non-discretionary functions (where it does not). It goes without saying that so-called ministerial acts which do not involve some measure of discretion are probably few and far between. See, *e.g.*, K. Davis, *Administrative Officers' Tort Liability*, 55 Mich. L. Rev. 201, 206 (1956). In looking at the traditional and thoroughly unsatisfactory discretionary ministerial dichotomy one wonders if the better approach would not be to look instead at the sort of action involved. If it is in essence an adjudicatory decision, certainly the making of an innocent mistake in judgment ought not to result in liability of the individual whose official duty it is to make such decisions. Such a decision, just as honest judicial error, is simply not a personally wrongful act, and the officer ought therefore to escape liability. To ask a man to give his honest opinion and judgment and then impose liability on him for honest error places the public official in an impossible position––to the great detriment of government. There is no good reason why anyone should be liable for the honest making of such an adjudicatory decision simply because one labels it to be ministerial as opposed to discretionary.

Official Immunity in Civil Rights Actions

The civil rights legislation of 1871, among other things, made persons who under color of state law deprived someone or other of rights guaranteed by the federal Constitution or federal statutes liable for damages as well as amenable to equitable relief. See, *e.g.*, 42 U.S.C. §1983. Since persons acting under color of state law are in most cases apt to be state or public officials or employees, the civil rights legislation quite obviously created a tension between the immunities of public officials which we have been discussing and the clear intent of the civil rights legislation to provide redress for injuries inflicted by these various officials. How then are these immunities to be treated in civil rights actions?

As we have already seen, with respect to the long-standing immunities of legislators and judges ––immunities of an absolute nature within the proper confines of their legislative and judicial activities––the Supreme Court held that since there was no clear showing of any legislative intent to abrogate these absolute immunities insofar as personal liability for damages (as distinguished from injunctive relief) was concerned, the absolute immunities continued. See, *e.g.*, *Stump* v. *Sparkman*, *supra*, and *Tenney* v. *Brandhove*, *supra*.

Unfortunately for public executive officials and administrators, however, the Court proved to be far less protective than in the case of judges and legislators. The leading decision here was in the recently decided case of *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). Parents of students killed during the disturbances at Kent State University sued Governor Rhodes, the adjutant general of Ohio and his assistant, as well as various officers and enlisted personnel of the Ohio National Guard, alleging that the student deaths resulted from intentional, wreckless, willful, and wanton acts of the defendants. The district court dismissed the complaints, holding, *inter alia*, that official immunity was absolute. The Supreme Court reversed. Noting that the doctrine of absolute immunity would in effect nullify the civil rights statutes, and noting further that the immunity of police officers was always qualified (*i.e.*, requiring a showing of good faith and probable cause) the Court, notwithstanding the historical difference between the immunities of police officers and of high-ranking governmental officials (such as the governor of a state), simply opted for a qualified immunity only with respect to actions brought under the civil rights statutes. The case was remanded for further proceeding to determine (1) whether the individual defendants were acting within the range of their discretionary duties and responsibilities, and (2) whether they acted in good faith respecting their actions. The rule in civil rights settings which the Court announced was:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all of the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. (16 U.S. at 247–248.)

The drastically narrowed defense of official immunity available to public executives and administrators in civil rights actions was even further limited but one year later in *Wood* v. *Strickland*, 420 U.S. 308 (1975), where the court held that good faith is measured both subjectively and objectively. According to the Court, the official must be acting sincerely and with a belief that he is doing the right thing (*i.e.*, subjective good faith) but must also be acting in accordance with at least those principles of the law which can be said to be settled, undisputed principles of law. Following *Wood* v. *Strickland*, in other words, public officials, although not yet required to be attorneys specializing in constitutional law, must be aware of what the court describes as "basic, unquestioned constitutional rights of his charges" (whatever this may mean). The bottom line, of course, is that since a plaintiff can henceforth be expected uniformly to insert allegations of malice, bad faith and corruption, suits against public officials can no longer be similarly tossed out of court in civil rights settings through a simple showing that the act complained of was performed by the official acting within the proper scope of his discretionary authority. In civil rights actions the doctrine may continue as to judges and legislators; but as to executives and administrators of the executive branch of government, official immunity is but a shadow of its former self.

Conclusion

Thus, as we have seen, the doctrines of legislative and judicial immunity on the federal and state levels are virtually absolute, and persons making offical decisions within the jurisdiction of the legislative and judicial branches of government need have little concern about personal liability for or legal consequences of their decisions.

On the other hand, the doctrine of official immunity, except for certain high-ranking executive government officers, remains unsettled and cannot be relied upon as a defense to personal liability by even the most astute public administrator acting well within the scope of his discretionary responsibilities. Those who actually run the executive ship of state are virtually unprotected.

What then is the remedy for executive administrators whose daily decisions require that they walk a legal tightrope? One answer may be, as has been done in some jurisdictions, a judicial extension of the doctrine of official immunity to persons making adjudicatory decisions. After all, the doctrine of judicial immunity was developed by the judges and for the judges. Another solution may be a recognition of the problem by the Congress and state legislatures through the enactment of broadly defined legislative official immunity statutes.

Until the question of immunity of public administrators is resolved, perhaps the best advice that one might suggest is to act honestly, fairly, in good faith, and on the advice of counsel. Finally, prudence dictates that some type of liability insurance or indemnification be afforded those officials whose decisions are open to question.

Student Life Issues: The Campus and the Classroom

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Since the early 1960s there has been a continuing proliferation of court cases involving students. Student activism of t' t decade included marches, demonstrations, sit-ins, lie-ins, and various other forms of protest. That activism resulted in the recognition by the courts that the United States Constitution must be acknowledged as a permanent campus fixture. Many decisions have now underscored the fact that no citizen sheds his constitutional rights upon entering the campus gates, but neither does one acquire any special privileges upon entrance. Although the student rights movement on campuses has quieted somewhat in recent years, the form of that movement has now shifted into the courtroom. It is there where the battles are being fought as the courts are continually being asked to define the rights and responsibilities of students as well as faculty and administrators in their relationships with students.

My assignment today is to review some of the recent significant decisions relating to students. The cases reviewed concern basic campus activity issues as well as those related to academic matters.

Freedom of expression is one of the basic rights secured by the United States Constitution. Two recent cases dealt with the topic. The president of Bee County College in Texas received complaints about Iranian students enrolled in the college. The complaints alleged failure to pay rent, bad checks, unauthorized phone calls to Iran on college telephones, unlawful filling of private mailboxes with the Iranian Student Association newspaper *Resistance*, intimidation of non-Iranian students by Iranian students, and cheating on college examinations. The president notified all of the Iranian students that he wanted to talk to them in the college gymnasium. Approximately 100 Iranian students attended the meeting at which the president spoke about the complaints and asked the students to determine among themselves who was creating the problems and then to put a stop to them. At the close of the meeting, the students refused to leave the gymnasium, and there was considerable chanting and clapping. Because of their refusal to leave, several physical education classes had to be cancelled. After many attempts to get them to leave, they were arrested and taken to jail. The college brought disciplinary charges against the students for disrupting the lawful activity of the college, interfering with the rights of others, engaging in unlawful conduct, and refusing to comply with a lawful order of college officials.

In upholding the action by the college, the Court noted, "Although it is without doubt that students enjoy First Amendment rights, it is equally clear that those rights do not allow students to 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' " Since the students created a substantial and material interference with the operations of the college by forcing the cancellation of several classes and the ultimate closing of the gymnasium, such action was not protected by the First Amendment.[1]

In another case the Union of Iranian Students, a campus-recognized organization at Texas Tech University, applied to the university for a permit to hold a peaceful demonstration against the Shah of Iran on the university campus. The university granted the permit, with the proviso that during the march the students could not wear masks. The president of the campus Union of Iranian Students filed suit to obtain a temporary restraining order to prevent the university from prohibiting the students from wearing masks during the demonstration. He claimed that his First Amendment rights were violated by the restriction. He claimed that without the masks, the students would be afraid to demonstrate because they feared reprisals from the shah. He further claimed that the masks had become symbols of protests against the shah's regime.

The university feared that because the shah's son, the prince, resided in Lubbock, and because other anti-shah demonstrations had not all been peaceful, there might be an outbreak of violence. It argued that anonymity might encourage the demonstrators to engage in violent activity which, if they were readily identifiable, they might not otherwise undertake. A prior demonstration on the campus had been peaceful. The university further argued that wearing the masks falls within the prohibitions of the Ku Klux Klan Act because the students intended to deprive the prince of his constitutional rights. [The Ku Klux Klan Act provides that "if two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators." 42 U.S.C. § 1985 (3).] Finally, the university argued that even if the wearing of masks enjoys some protection under the First Amendment, the state's interest in averting the dangers the masks pose outweighs the students' protected interest in wearing them.

The court quickly dispatched the argument by the university that the demonstrators' activities might violate the Ku Klux Klan Act by declaring that there was no evidence other than pure conjecture that the demonstrators were "go(ing) in disguise . . . for the purpose" of depriving the prince of his constitutional rights. The court agreed with the students that one purpose of the masks was communicative, in that masks had become a symbol of opposition to a regime which is of such a character that its detractors believe they must disguise their identity to protect themselves. In declaring that the university had not demonstrated a substantial causal relationship between the restriction and the interest the restriction is supposed to further, the court declared, "The officials have offered no concrete proof that these students in this demonstration will erupt into the violence that the no-mask regulation is supposed to prevent. Because the connection between the prohibition and the University interest is merely speculative, the regulation cannot stand; for 'in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' "[2]

One recent case concerning procedural due process is worthy of note. A University of Rhode Island student was charged in state court with violent assault with intent to rape. He was also charged on campus for the same alleged offense. He was given notice of the charges as well as the procedures to be employed at the campus hearing. University rules allow a student the right to request the assistance of an advisor of his choice from the university community, but the student is not permitted to employ professional legal counsel or other persons outside the university community to present the case before the hearing board. The student claimed that his due process rights would be violated if he were not allowed to employ legal counsel since he was being charged with the same serious offense in state court and any testimony at the campus hearing might be used against him in the criminal proceeding. The court pointed out that the student's testimony at the campus hearing would not be compelled but voluntary and therefore would subsequently be admissable at the criminal case. Thus, the court noted the student's need for an attorney by declaring, "Only a lawyer is competent to cope with the demands of an adversary proceeding held against the backdrop of a pending criminal case involving the same set of facts. The risk involved in participation at the hearing is substantial with counsel present; without counsel, it is enormous. The presence of counsel will, of course, not remove all risks. It will, however, enable appellee to make an intelligent, informed choice between risks presented." In holding that the student must be allowed to have counsel at the campus hearing, the court underscored the limited role of counsel that it deemed appropriate by stating:

> Counsel would be present only to safeguard appellee's rights at the criminal proceeding, not to affect the outcome of the disciplinary hearing. Counsel's principal functions would be to advise appellee whether he should answer questions and what he should not say so as to safeguard appellee from self-incrimination; and to observe the proceeding first-hand so as to be better

> prepared to deal with attempts to introduce evidence from the hearing at a later criminal proceeding. To fulfill these functions, counsel need speak to no one but appellee. Counsel should, however, be available to consult with appellee at all stages of the hearing, especially while appellee is being questioned. Appellee, or his chosen U.R.I. counsel, will conduct the defense. The board will be conscious of the presence of an outsider, but this will emphasize the potential as well as present gravity of the charge. The presence of counsel will not place any financial or administrative burden on the University. It will set a precedent only for a truly unusual situation . . . . The most serious effect on the hearing of having counsel present that we can anticipate is that it will probably take longer to complete.[3]

Last year we had the *Bakke* decision, which concerned alleged reverse discrimination in admission. This year there was one significant case of that type. An Italian-American law school applicant brought action challenging the constitutionality of the Special Academic Assistance Program (S.A.A.P.) administered by the University of Colorado School of Law. The program is designed ". . . to identify prospective law students who appear to have the intellectual ability to graduate from this law school but would not otherwise be eligible for admission under normal admission standards, and who are members of identifiable groups which have not had adequate educational and cultural opportunities available to them and which are seriously underrepresented in the legal profession."[4]

Various groups, which include Negroes, Mexican-Americans, and American Indians, had been identified as meeting the criteria——primarily from census bureau data——which reflect such information as median and per capita income, education level, and representation in the legal profession. However, Italian-Americans did not fit the program's criteria at that time. That group was defined as foreign born or native born with one foreign born parent.

Applicants for the S.A.A.P. are screened to determine whether they are members of an eligible group. The S.A.A.P. is a competitive admissions program for those eligible, and both subjective and objective criteria are used in evaluating eligible applicants. The applicant (plaintiff) applied for admission through the S.A.A.P. for the entering class of 1973 and again in 1974. In both years his application was rejected on the basis that he was not a member of an identifiable group having inadequate educational and cultural opportunities and seriously underrepresented in the legal profession.

The applicant argued that while a program for the disadvantaged is itself constitutional, the S.A.A.P. as administered by the law school is unconstitutional in that it operates to exclude persons solely on the basis of their race or ethnic background. He claimed that he, being of Italian-American heritage and a product of slum schools, was educationally, socially, and economically disadvantaged and should have been considered an eligible applicant for the special admissions program. He in effect sought the court's invalidation of the exclusion of his ethnic group, and others similarly situated, from the S.A.A.P.

The applicant appealed the decision of the trial court which ruled that he had no standing to challenge the constitutionality of the S.A.A.P., since he would have no remedy available to him even if the program were found to be unconstitutional. The court declared that the threshold question is whether the applicant has standing to challenge the constitutionality of the S.A.A.P. It reasoned that the applicant did not want the special admissions program to be declared unconstitutional but rather ". . . to be redrawn along non-racial lines. The program as established by the law school is drawn along group lines. For example, one of the principal criteria of the program is that the applicant be a member of a group which is underrepresented in the legal community. DiLeo asks us to declare unconstitutional this group aspect of the program. But this would be in effect to strike down the program as presently constituted. It is not the proper function of a court to establish an admission program for a university, nor to rewrite the program according to its own notions. Thus the import of DiLeo's argument would be to leave the university with no special admissions program. Since DiLeo would not be admitted through the

regular admissions program, a successful challenge to the program's constitutionality would leave DiLeo's position unchanged."[5] The court concluded that, since the applicant could not benefit from a ruling that the special admissions program is unconstitutional, he therefore has no standing to raise that issue.

One recent case concerned age as an admissions criteria. A fifty-one year old female applicant for admission to a graduate program in educational psychology at the University of Utah was rejected for admission. The applicant brought suit, alleging that her credentials, educational background, experience, academic record, and test scores exceeded the normal requirements for admission to the department, that the department gives preference to younger students, and that the applicant was rejected solely on the basis of her age. The district court dismissed her action and she appealed.

The Supreme Court of Colorado held that a state educational institution may not use age as the sole ground for denying admission absent any regulations or standards concerning age as a criterion. The court found the denial of admission based solely on the applicant's age as offensive to the equal protection provisions of the U. S. Constitution and the Utah Constitution.

> . . . in that on the abbreviated record before us there are no standards or regulations presented defining or concerning age or other criteria for making decisions on admission. Hence, there is a failure to meet the rational relationship test which ". . . requires only that the State's system be shown to bear some rational relationship to legitimate state purposes . . ."[6]

The court did state that age was not a suspect classification nor post-graduate education a fundamental right; thus only a rational relationship test would be applied.

Institutions do have the authority to promulgate and enforce those rules and regulations necessary to maintain the educational atmosphere in order that the institution may fulfill its legitimate purposes.

Several male students at North Georgia College challenged a long-established policy of the college that all students, with certain limited exceptions, must reside on campus. For males, this regulation also triggers the requirements to enter the Corps of Cadets. The residency rule is as follows:

> 1. All unmarried undergraduate students are required to live in residence halls. Exceptions to this policy may be made in the following cases: (a) Students who live in and commute from the residence of parents, grandparents or legal guardians within a 40-mile radius of Dahlonega. (b) Students who have a baccalaureate degree. (c) Students who have completed twelve quarters in residence and male students who have fulfilled the prescribed military courses and activities. (d) Students who have been honorably discharged after one full year of military service. (e) Students who have successfully completed induction. (f) Students over twenty-four years of age.[7]

The college was founded in 1873 primarily as a military institution, and is presently one of only four senior colleges in the United States classified as a military college by the United States Department of the Army. (The others are the Citadel, Virginia Military Institute, and Norwich University.) All resident male students must become members of the Corps of Cadets and abide by regulations similar to those of the service academies. The students charged that the rule unconstitutionally violates their rights to privacy, travel, free association, and equal protection. The Supreme Court of Georgia ruled that the Court quickly dismissed the students' contention that the residency rule violated constitutional rights to privacy, travel, and free association by declaring that ". . . the college has the inherent right to promulgate and to enforce reasonable rules and regulations which impair a student's perfect freedom to do as he pleased." As to the requirement that all resident males must enter the Corps of Cadets, the court declared that the students' argument ". . . is too vague and formless to subject the requirement to serious challenge." As to that argument it concluded that ". . . their argument is, basically, that they do not like military discipline, do not care to

participate in the Corps of Cadets, and should not be required to participate as a condition of receiving an education at a publicly funded school which is uniquely attractive to them because of its locale and quality."[8] Therefore, the court stated that the constitutional challenge is whether or not the requirement is rationally related to a legitimate state end. Since under federal regulations the college would lose its status as a military school if it did not enforce the rule of mandatory enrollment by resident males in the Corps of Cadets, the rational relationship test is met. As to whether the regulation constitutes invidious sex discrimination, the evidence showed that the need of the armed forces for female officers was adequately met through voluntary training of a relatively small number of women and therefore the mandatoriness of training for male and not female resident students is rationally related to the needs of the services. The court pointed out that sex is not an inherently suspect classification and therefore the rational relationship test is appropriate.

More significant decisions concerning students are being handed down regarding classroom and other academic matters than discipline or other campus endeavors. Courts are reluctant to enter into the academic arena, but they will enter to insure basic fairness.

No hearing is required prior to an academic dismissal, but a student may be stigmatized by an action which might necessitate a due process hearing. A student at the University of Missouri-St. Louis was enrolled in the Student Teaching Program, which is a required course for those students seeking to obtain certificates to teach in the schools in the state of Missouri. During the last half of the quarter, problems appeared with his student teaching in one of the local high schools. He deviated from the lesson plans and in general his behavior was most unusual. A meeting was arranged with the student, his university instructor, the high school principal, and the high school cooperating teacher in order to discuss and, it was hoped, resolve the student's problems. At this meeting the student was uncooperative, and the principal eventually told the student he could not continue his student teaching.

The university instructor wrote a note to the associate dean of the School of Education at the university outlining what had transpired. In the note she expressed an opinion that the student was in need of psychological help. There was no evidence that the note was ever disclosed to anyone or that it would be disclosed in the future. After meeting with the instructor and the Coordinator of Advisement of Clinical Services in the School of Education, the dean summarized the student's deficiencies as had been outlined to him as follows: "(1) difficulty in hearing and accepting criticism; (2) difficulty in focusing on day-to-day matters of students' learning and details of teaching, preferring instead to philosophize; (3) failure to follow written lesson plans and frequent straying from assigned topics; (4) failure to detect and correct grammatical errors; (5) tendency to overidentify with the students; and (6) failure to answer direct questions and enter into a dialogue about his progress and problems."[9]

The dean requested that the student voluntarily withdraw from the student teaching course; otherwise, he would be administratively dropped from the course. Approximately two weeks later the student was administratively dropped. The student claimed that the note from his instructor to the dean which suggested that he was in need of psychological help imposed a stigma upon him and that he was deprived of due process when he was administratively dropped from the course.

The Federal District Court ruled that where a student is deficient in a course, exhibits unusual behavior, and refuses to cooperate with attempts to correct his deficiencies, and therefore is administratively dropped from the course, the writing of a note by his instructor to the dean which opines that the student is in need of psychological help does not constitute a stigma upon the student necessitating a due process hearing when the note is kept in confidence and is not the basis for the decision to drop the student from the course.

The court noted that there is no requirement for a hearing when a student is being dismissed for academic deficiencies. As to the note's creating a stigma requiring a hearing, the court concluded

that there was no evidence that the note was the basis of the dean's decision. Furthermore, there was no evidence that the note was revealed to anyone or that it would ever be revealed in the future. Also, there was no evidence that the note would be revealed to other schools to which the student might seek admission, or would in any way be made part of the explanation of why he was administratively dropped from the course. Finally, the court concluded that the facts clearly support that the decision by the dean to drop the student was made in good faith and not arbitrarily.

The court noted that even assuming that the student was entitled to a hearing, the meeting at which he was told of his deficiencies and given ample opportunity to cooperate in attempting to resolve those deficiencies constituted all that due process required.

In academic matters it is a contractual relationship between students and the institution. This is exemplified by a recent case in Montana. Students enrolled in a course of study in aviation technology at Missoula Technical Center brought action alleging that the course, for which they had enrolled and in which they had completed three out of six quarters, was unlawfully terminated by the Board of Public Education for the State of Montana.

The literature published by the center describes the aviation course as one leading to a private pilot's license and to employment by the general aviation industry. The curriculum described in detail the courses offered, which included both classroom and actual flight training, extending over six quarters. All courses listed were required courses.

The Montana legislature appropriated less money in 1977 for the operation of vocational centers in the state; and the Board of Public Education, in making some adjustments in the programs offered, eliminated the aviation technology program. As a result, the students could not complete their training. Since the program was integrated, there were no credits earned which readily could be transferred, and the students were left with three quarters' training of dubious valueto them. The students brought action for damages alleging breach of an implied contract between them and the state of Montana that they would be given an opportunity to complete the program.

The Federal District Court held that the elimination of a course of study, leaving students with only some training of dubious value and no opportunity to complete their training, constituted a breach of an implied contract to afford the students an opportunity to complete the program. The court first noted that the relationship between a student and a post-secondary educational institution in academic matters is contractual in nature. As to the existence of an implied contract the court declared, "Only that which is reasonable may be implied. Certainly in the period of time between a student's matriculation and graduation, an educational institution, which is a living, changing thing, may not reasonably be expected to remain static; and, conversely, change may reasonably be expected. Hence, each statement in a publication of what now is true does not necessarily become a term in the contract between the school and the student."[10]

In ruling that there was an implied contract between the board and the students, holding that the students enrolled in the aviation technology course would be given the opportunity to complete the training period of six quarters and receive a diploma evidencing such completion, the court stated, "Here, however, from all that was said by the Center, any student enrolling would know that he was required to dedicate six consecutive quarters to the aviation technology course, that any time spent short of two years would essentially be wasted, and conversely, the Center would reasonably know that a student enrolling and spending three quarters would expect an opportunity to complete the remaining three quarters."[11] The court ordered that the state of Montana is liable to each of the students in such amounts as they may show they have been damaged.

Institutions are sometimes ordered to grant degrees to students when the student's contractual rights have been violated. A student at John Jay College of the City University of New York had completed the credits required for the degree of master of public administration with a 3.54 average out of a possible maximum of 4.0.

One of the requirements for graduation was either the submission of a thesis or the passing of a comprehensive examination. The student had enrolled in the review course in preparation for the examination. At that time there were no written regulations with respect to the examination, and the only criteria were those announced orally by professors in the review course.

In one of the class lectures, the professor in charge, in the presence of another professor, misinformed the students as to the requirements for passing the examination, telling them that in order to pass a student must pass three out of five questions, with an overall average of 2.8. The professor asserted that what he meant to say was that each student should obtain a grade of three out of five points on each question and that it was necessary to answer four out of five questions with a grade of three or better. The student claimed that he would have apportioned his time differently had the correct criteria been made available to him. He received a grade of three or more in three out of the five questions, with an overall average on the examination in excess of 2.8, sufficient under the erroneous criteria announced by the professor.

The college refused to award a degree to the student but did offer to permit him to retake the examination. The student refused the offer and brought action seeking to have the college directed to award the degree to him.

The court held that in the absence of written criteria, where a professor erroneously informs students of the criteria for passing a required comprehensive examination for a degree, a student must be granted the degree if he satisfies the erroneous criteria.[12]

A student at the University of South Alabama College of Medicine was dismissed for academic deficiencies. The student's grades for the year included four failing grades, one below average grade, one average grade, and four passing grades. His overall grade average was 65.13. The College Bulletin states that for each course a grade below 65 is a failure. However, an adjusted numerical grade of 65 to 69 was considered a conditional grade, and the department head or the coursemaster was to submit a recommendation to the administration setting out what steps ought to be taken to remove the condition. The student claimed that since his overall average was above 65, the college had breached a contract with him when it dismissed him for academic deficiencies. He was given a hearing before an appeals committee which upheld his dismissal.

He alleged that his procedural due process rights were violated since the committee which recommended his dismissal was allowed to serve as the appeal body. He also alleged that other students were treated differently from the way he had been treated. Finally, he alleged that he had been discriminated against because he was black.

The Federal District Court ruled that where a college bulletin states that any grade below 65 is a failure, the dismissal of a student who has failed several courses, but whose overall grade average is above 65, does not constitute a breach of contract by the college.

The court ruled that the school had not breached a contract with the student and that, in fact, the argument of the student was frivolous. It declared:

> The bulletin speaks only to single course grades, and does not stand as a measure by which the average of all such grades is to be compared. The ludicrousness of the plaintiff's position is best exemplified by the situation in which a student might receive a grade of 63 in five courses and a 90 in the other. On this record the student would have failed five of the six courses and yet would have an average grade of 67.5 which would be conditional. This was not the intent of the administration in adopting the scholastic guidelines and the Court is convinced that the language of the bulletin is not so vague as to imply this result.[13]

As to his due process allegations, the court pointed out that it was questionable as to whether he was even entitled to a hearing. However, even assuming that he was entitled to a hearing, he was afforded adequate due process procedures. As to his having been treated differently from other students, the court noted that there was no evidence that anyone with a similar academic record and individual history was afforded substantially

different treatment from that received by him and, therefore, that none of his rights were violated. Finally, the court ruled that there was no evidence that he had been discriminated against because of his race--merely speculation on his part that he was the victim of such discrimination.

A student at Delaware Valley College attended a sophomore class picnic held at a grove owned by the Meannercher Society. The sole means of transportation between the campus and the grove was by private automobile. Members of the class were invited to the picnic without paying a fee, and draught beer was served in unlimited amounts. College regulations prohibited the use of intoxicants by students under the age of twenty-one years.

The sophomore class faculty advisor participated with the class officers in planning the picnic, assisted in the disbursements of funds to purchase alcoholic beverages, but failed to attend the picnic or to obtain another faculty member to attend as his substitute. The college administration printed flyers containing drawings of beer mugs which were displayed across the campus.

The student left the picnic as a passenger in an automobile which, on the way back to the college, went out of control and crashed into a parked vehicle. As a result of the collision, the student suffered injuries which caused quadraplegic paralysis.

He alleged negligence on the part of the college for not properly supervising college-sponsored extracurricular activities. The trial court found four defendants liable: the college, the driver of the automobile, the Borough of Doylestown, and the beverage company which sold the beer to the students. The jury awarded $1,108,067 to the student, and $5,000 each to his mother and stepfather.

A college which has a rule against the use of intoxicants by students under twenty-one may be liable for negligence in its supervision of extracurricular activities, if it cooperates in allowing consumption of alcohol at such activities and an injury occurs as the result of an accident in an automobile driven by one who consumed alcohol at the activity. The court noted that the college, by its own regulations, recognized the inherent danger in the use of alcohol by immature students. The court concluded that alcohol was a substantial factor in causing the accident. The picnic was a college extracurricular activity and therefore, the court concluded, "In any event, the College owes a duty to use due care under the circumstances to prevent an unreasonable risk of harm to sophomores who attend a class function."[14]

It is without question that we are living in legalistic times and we cannot escape our responsibilities. It is also certain that we can help to alleviate some of the pressures for legalism if we maintain those policies and practices which enhance the free marketplace of ideas and where the worth and dignity of each individual is given the highest priority.

We have the opportunity to educate the faculty concerning student rights--particularly regarding academic matters and possible liability. Student personnel administrators should have learned their lessons in the '60s and early '70s: if student rights are not respected, the courts will enter the campus to force that respect.

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15

Selection, Appointment, and Retention of Faculty and Staff

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Any paper written or to be presented by an attorney (much less by a professor law) begins by leaving one with a sense of desperation, I am sure. First off, I am mindful of the bits of wisdom about lawyers shared by some fourth graders. One said, "A good thing to remember about needing a lawyer is don't." Another said, "Lawyers sometimes become judges. Maybe they become attorneys, too. I do not know. It takes all my knowing to know the lawyers sometimes become judges." The crowning statement was: "Once I had a chance to read a whole stack of law books. Things they say in law books are only to look at, not to understand."

Retrospectively one can appreciate these comments of great wisdom. To follow the title of this conference, however, one should hope that in the prospective the analysis might be more favorable.

What will it be like in the process of selection, appointment, and retention of faculty and staff in higher education in the 1980s? What will be the effect of *Bakke*[1] and *Weber*?[2] What might be the results of *Cannon*?[3] To be sure, *Bakke* is "still in school"—i.e., the student is in the classroom and the case and its meaning are still in the process of evaluation. All sides have claimed victory and all sides have lamented failure and setback. Will *Weber* answer any of these questions? *Bakke* was not an employment case, to be sure. *Weber* will deal more directly with employee aspects of affirmative action. *Cannon* determined that females have the private right to sue under Title IX. But what of *Gomes*,[4] where the male high school student was deprived of the right to play volleyball on the only team fielded by his school? Or what of the Supreme Court decision in *Craig* v. *Boren*,[5] where the Arkansas statute setting different and lower ages for females to be allowed to drink beer was struck?

With the full scope of litigation before us, we will in the 1980s see a more articulate judiciary responding to a more specifically demanding plaintiff and defense bar. For example, nine federal district courts and two federal appeal courts have held that the Department of Health, Education and Welfare had exceeded its authority and the directions of Congress in its Title IX regulations. The latest rulings on this point may be found in the decisions of *Isleboro School Committee* v. *Califano*,[6] where the First Circuit Court of Appeals ruled that the Title IX regulations did not and could not apply to employees. While *Isleboro* might be properly cited as not being a case involving higher education, one need only look at *Junior College District of St. Louis* v. *Califano*,[7] where the Eighth Circuit Court of Appeals on April 19, 1979, rejected HEW's infection theory (a ray-of-hope argument drawn by HEW from *Taylor County Florida* v. *Finch*[8] and then with some degree of interpretative neol[illegible]y or affectation) which would maintain that it is impossible to fully enforce Title IX for students without equal enforcement in employment because one so significantly infects the other. The Eighth Circuit was not satisfied that HEW had shown any nexus between the discrimination against employees and its effect on the student population. The case of *Seattle University* v. *HEW*[9] settled the same issue of Title IX for private colleges and universities.

In the 1980s we shall see more definitive reactions to the efforts of federal agencies (and maybe state agencies) to enlarge on legislation. The federal (congressional) guide establishing the process by which regulations are to be issued as approved may also be in question. An example of this is the current debate on the submission of "something" to Congress in reference to Title IX. Some are arguing that the submission contains new regulations. Others argue that the material is only

interpretation and therefore should not be submitted to Congress for its perusal.[10] Needless to say, the rules are not yet clear. They will continue to be developed into the 1980s.

Some persons would argue that the faculty evaluation process attaches only at the stage of promotional considerations. Such is simply not the case. As the title of this particular paper indicates, there are three stages of evaluation--and each is equally critical with the other two.

For students, the Family Educational Rights and Privacy Act protects records from abuse. This law, referred to as the Buckley Amendment, does not, however, attach any rights to the applicant student. One must be processed further to enjoy the benefits of this protective enactment.

There is not any such protective shield for those considering prospective faculty. Such a suit against an institution arose when Professor Bruce Franklin[11] returned to Stanford University in an attempt to regain a position on the faculty there. As one writer has suggested, the courtroom may become, or may have already become, a tool for the "litigious and the vengeful."[12]

In the process of selection, appointment, and retention of faculty, the college or university in the 1980s will continue to face a growing myriad of federal and state statutes, each claiming its own place in the framework of employee relations, even within the educational world.

The Supreme Court in the now famous *Bakke* decision addressed the issue of the First Amendment rights of the educational institution. With a degree of repetition seldom found in judicial decisions, the Court, speaking through Mr. Justice Powell, quoted from an earlier decision wherein Mr. Justice Frankfurter had talked about academic freedom.[13]

Justice Frankfurter identified the four essential freedoms as property of the university itself. These freedoms included the right "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The Justice had continued by stating, "Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . ." As we face the 1980s we shall see the need for a clarification of this point and determine the degree of its application to the colleges and universities of this nation.

The point is emphasized many times over by the writing of Philip A. Lacovara in an address delivered to the Seventh Annual Conference of the National Association of College and University Attorneys, Atlanta, Georgia, June 1977. Mr. Lacovara's paper, which may be located in *Journal of College and University Law* (4:223), asks how far the camel will slip under our tent.

Truly, the federal camel has slipped under the academic tent, and a hump may still be evident. The real problem is realized when one takes note of the fact that it is no longer the camel that is doing without the water. It is the tent of academics under which he has become lodged that is suffering. The academic process is being subjected to the demands of many. The process of selection and appointment and retention is evaluated and scrutinized as never before. The administration of the university has become one of fund raising and defense work in the courts. Academic freedom is being subjected to the many faceted debates of new frontiers and new avenues for learning experiments. The federal government has become involved in the process of curriculum development and student allocation. The issue of sex has been raised concerning the on-campus activities of athletics, drama, and student organizations. Curriculum development now must consider physical facilities in new lights. The physical ability of the consumer, as well as the ability of the physical accommodations to meet the needs of the consumer, must be considered.

Another reference to the volleyball case of Donald Gomes will point out an area that promises to be interesting in the 1980s. In *Gomes* HEW has taken the official position of "separate but equal."[14] The U. S. Justice Department has supported this argument to the First Circuit Court

of Appeals in an attempt to deny the male student the right to play on the only volleyball team at his high school.

HEW relies on its own regulations and argues, within the context of "separate but equal," that Title IX requires only that schools effectively accommodate the interests and abilities of members of both sexes. This is not argued to mean that the sexes must be allowed to play on the same teams. If dress codes and hair lengths are no longer important, what will become of volleyball?

One can ask only if we are to go through the *Plessy* v. *Ferguson*[15] era now with reference to the issue of sex. If "separate but equal" was not to stand the test of time in the era and area of race considerations, what of the current efforts of HEW to impose, as federal policy, that very doctrine under Title IX?

And as we evaluate the *Bakke* decision and the desire to the Court to look to the legislative history of Title VI of the Civil Rights Act of 1964 for color-blindness, what might we anticipate in the years to come in sex? If one is to be blind to color must one also be oblivious to sex? What then of HEW?

If the courts are prepared to accept the challenge to federal regulations that go outside the law--as it certainly appears that they are--we will in the 1980s see much more litigation forcing the issue of legislative intent and constitutional meaning. Hard decisions must be faced in the years to come, and some of these will force the Supreme Court to rule not on legislative history but on constitutional dictate.

What does the Fourteenth Amendment say?[16]

What does the Fourteenth Amendment mean?

Are these questions one and the same?

What does the proposed Twenty-Seventh Amendment, referred to as the ERA, say?[17]

What would it mean? How would it affect the other parts of the constitution? What would be the impact of the legislative history of the ERA?

If Title IX does not impact on employment in higher education, what does the employee do? To what law does she (or he) turn? What of Title VII?

Title IX, as mentioned earlier, has been ruled, without exception, to apply only to students and not to employees. The Supreme Court decision in the case of Geraldine Cannon did not impact on employment. There an applicant to the medical schools at the University of Chicago and Northwestern University was denied admission. She had not applied for employment at either of those institutions, even though she was a surgical nurse at the time of her applications.

From the "separate but equal" era of Title IX, will the college or university of the 1980s go through the same developmental phases as did public schools with the color barriers--i.e., a grade a year, to freedom of choice, to the creation of new districts based on sex calculations and population distributions, followed by the demand for unified districts or systems with consideration given to sexual make-up and professorial assignments based on sex?

Whatever the trend of the 1980s, one should be prepared for more clearly defined lines of selection criteria, appointment parameters, and retention potentials. While "freedom of the press" generally belongs to the publisher rather than to the staff writer, it appears that "academic freedom" will be clarified as belonging to the institution rather than to the individual instructor or professor.

This idea is supported by the very language of the United States Supreme Court in *Bakke*, set out earlier in this paper. The "academic freedom" there discussed was clearly identified as a "property of the university."

Looking into the 1980s one can only speculate as to the full realm of issues that might present themselves in academia. The history of the past few years serves best to confirm the hazards of projections. Nevertheless, it appears reasonable to anticipate a period of somewhat more strained relations between the university and her faculty. The growth of, the demand for, and the reactions to such ideas as affirmative action, labor contract negotiations, rank and tenure considerations, the

refinement of promotional programs along with the practical death of "de facto" tenure or promotional systems, the considerations of sex, race, age, and handicap, and the inflationary spiral met with financial exigency are all certainly to be factors that will shape the academic marketplace in the 1980s.

Will academics be employees[18] or quasi-supervisors? If quasi-supervisors, what role will they be allowed to play in "supervising"? What would the solidification of this trend, even in court decisions, such as the *Yeshiva* case, do to the demand for unionization and better working conditions? Can a supervisor demand, from himself or herself, better conditions? Or greater productivity? Or more input into the production of the financial abilities with which to meet these greater demands for better conditions and benefits?

In making the selection of faculty in the 1980s, universities will be required to know and make known just who has the authority to represent the governing body of the institution in making employment decisions.[20] And the appropriate person must know, understand, and operate within that responsibility.

Where applicable, universities will have to give consideration to such factors as race, sex, age, national origin, and religion in hiring practices. It is anticipated that cases will arise testing the constitutionality of more federal statutes and regulations. Cases affecting Title IX serve as only one example, to date. Statutes will be studied in full and responded to by institutions. Preambles will not suffice. Congressional recognitions of and institutional demands for other basic constitutional protections will be called upon by defendant universities. An example might be the particular amendments and exemptions placed in Title IX by the Congress relative to sororities, fraternities, and beauty pageants.[21]

Other examples might well come from those provisions of Title VII relative to the freedom of religion and religiously related, supported, controlled, or managed institutions.[22] Still other defenses could well be raised by various universities spelling out the claim of the institution for its own First Amendment freedom of academic individuality save only those demands that are determined by the U. S. Supreme Court to be fundamental rights to the individual citizen.

Therefore, it can properly be anticipated that the selection and appointment aspects of higher education employment in the 1980s will be more refined, more complicated, and more legalistically oriented. It could well be that the issues of selection and appointment will be made a part of the emerging battle of constitutional interpretations under "equal protection," "freedom of speech," "freedom of religion," freedom to hire and the freedom to practice one's own ideas in the employ of another. The sounding board of finality may come only in the form of more precise rulings on constitutional phrases and provisions.

Certainly, *Bakke* did not send all clear messages of direct constitutional interpretation that can be relied upon in higher education hiring practices. Will *Weber*?

Once the process of selection and appointment is complete, what of retention? Does this ask what the university must do to retain its faculty? Or, to the contrary, does this ask what the faculty member may do to protect that position to which he or she has been appointed. Will all employees be entitled to the protective benefits of appointed status? Such has not been the case in years gone by.[23]

In the academic community, the most polite way to avoid any legal hassle over departure from the faculty ranks would be to elevate the faculty member to an administrative position. Generally, if no teaching responsibilities are retained by the faculty members, no rights of tenure or retention are preserved to that faculty member. One Alabama case[24] held that an administrator could be summarily dismissed without even the basics of a hearing before termination.

Faculty may rely upon or press the need for uniformity in conditions of employment in the 1980s. While universities may offer positions to various persons within their respective areas of expertise, the university may also have the right to

demand the exclusive attention of the employee.[25] The demands should be fair and uniform as they apply to the different academic disciplines.[26]

In keeping with the trend toward greater detail, it will become more essential to have specific procedures for handling employee-employer disputes. Once developed, these procedures must be followed.[27]

Additionally, in the 1980s one must be more keenly aware of the difference between contract actions and constitutionally protected actions. For there to be appropriate reliance on constitutional protections, there must first be the establishment of "state action." [28] Where "state action" or "color of law" cannot be established, one might look to the fundamental law or "common law fairness" concepts for some consideration and possibly relief.[29]

For "state action" to be called into play for plaintiff professors or staff personnel, there must be a sufficiently close nexus between the state and the challenged action of the defendant entity. That nexus must establish the fact that the action of the private entity was, in reality, so closely related to the state that it was the action of the state.[30]

In the 1980s there may well be a greater degree of confidentiality attached to the actions of employer colleges and universities. This appears to be somewhat contradictory to the idea of openness and the freedom of information, but it was this degree of confidentiality that worked in favor of one college in a suit decided in 1978.[31] It was only when the plaintiff professor filed his suit that his problems of failing eyesight were made public and the college was not to be held responsible for the results of such revelations on his future.

Faculty and staff in the 1980s will see the need for more carefully worded contracts of employment. The "entering in" will be equalled in importance by the terms of the "going out." Some terms may be self-executing when not originally understood to have that effect. Such details gave rise to several lawsuits in the year 1978. In *Humphreys,*[32] seven professors agreed to a longer period of evaluation than they had originally understood was required. Professor Pauk[33] learned that "continuous employment" means that one may not take leaves and sabbaticals in the interim and still expect to enjoy the benefits of tenure as soon as might otherwise have been expected.

Not all contracts are to be fully discovered in one original sheet of paper with NCR copies to be retained by the college. Actually, academic employee contracts may well encompass many pages or chapters of the faculty handbook, the college personnel policy manual, the college bylaws, or even the institutional charter. Such was the case with professors Bellak[34] and Pinkney.[35] Professor Bellak was not so fortunate as was his academic employee colleague Pinkney. In *Bellak* the contractural language of the addendum handbook was sufficient, and in *Pinkney* such was not the case.

If, however, the addendum manuals are not clear, the plaintiff professor may benefit from that confusion.[36] In the 1980s, therefore, colleges and universities will be well encouraged to prepare such handbooks well. This might serve as an opportunity for faculty and staff to express a desire to evaluate these handbooks during the academic year, before contract renewal. Any requests for change should be expressed to the appropriate university officials in an attempt to produce those conditions that lend themselves to better teaching experiences and circumstances for faculty and staff. The strongest indication of the need for input into the development of operation manuals or personnel policy manuals is that, these manuals being contractural in nature, the faculty or staff employee is bound by them in most if not all problems that may arise related to the employment relationship.

To prevail in the face of termination or non-renewal, the plaintiff must, in nearly all cases, be able to prove entitlement and then deprivation. Failing to prove entitlement may well require failure of recompense before the courts.[37]

Plaintiffs are currently in somewhat of a quandry on the issue of proof. Christine Sweeney had been led to believe that she had met her burden of

proof against Keene State College. The First Circuit Court of Appeals[38] had held that the defendant college had the burden of proving the absence of discriminatory motive to overcome the prima facie case of the plaintiff. The United States Supreme Court took strong exception to this ruling and remanded the case for further consideration on the basis of *Furnco*,[39] where the Court had ruled that the defendant need only "articulate" a nondiscriminatory reason for the termination of the academic employee. The Court rejected the increased burden of proof enunciated in *Sweeney* by the first circuit.

The 1980s will, it seems evident, demand clarification on the issue of prima facie cases and burdens of proof, both by plaintiffs and defendants. At this point, there is only one sure "pretext" in the law, and that is the "judicial irony" of the divisions in this area of employment law.

Certainly, the 1980s will encompass more cases dealing with financial exigency. While the needs of the employee faculty ever increase, so shall the needs of the university employer. The supply of students will dictate largely the size of the faculty. It has been the developing trend that financial exigency may be relied upon for individual departmental layoffs without reference to the financial soundness of the remainder of the university family.[40]

Along with the lack of funds brought about by a shortage of students (purchasing consumers), some universities may be faced with the added loss of funds from the federal level. One should be mindful of the specifics of the congressional expressions in this regard, however. When Congress passed Title IX, specific wording was incorporated into the law making it less than proper to cut off any federal funds from any program not found to be discriminating on the basis of sex. The particular wording of the statutes addressed to HEW were phrased as follows:

> . . . but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found, or (2) by any other means authorized by law.[41]

The problem of the 1970s will continue into the 1980s with regard to this law. Plaintiffs call upon the enforcement provisions of the law to encourage compliance with the spirit of the preamble that there shall be no discrimination based on sex. Defendants will continue to articulate their defenses and may be expected to call upon the express wordings of the various acts of Congress as to the limitations for the curtailment or cutoff of monies. The infection theory will be argued and responded to. The cases ruling that Title IX does not apply at all to employees will make their mark on future considerations of Congress as well as the courts. The precedent cases rejecting the infection arguments of HEW will be tested.

The First Amendment rights of the institution as covered in *Bakke* will be tested against the First Amendment rights of students and faculty as set out in the cases of *Ofsevit*[42] and *Mt. Healthy*[43] dealing with faculty rights and *Tinker*[44] and *Dixon*[45] dealing with students' rights under the First Amendment.

The 1980s will also see a demand for more appropriately formed actions being presented to the courts. The case of Ilene Peper (No. 164) was founded on twelve different grounds or charges——at best a fishing expedition. The plaintiff admitted, under oath, that her charge was formulated by her attorney after her resignation from Princeton University. Another case of multiple approaches, resulting in equally dismal failure for the faculty member, was *Citron* v. *Jackson State University*.[46]

Plaintiff attorneys have been urged to become more articulate in the drafting of pleadings. Some cases have "gone sour" because of the complex arena of possibles presented to the courts. Some plaintiffs must be told, by competent counsel, that they simply may not or do not have valid cases. At best, they would be well served to be made fully aware of the strong line of cases dealing directly with their problem.

The 1980s will find the courts better identifying the line of intervention into the academic community and her affairs.

As the court stated in *Powell*:[47]

> It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior . . . .[48]

In that same case, the same court continued:

> The law does not require, in the first instance, that employment be rational, wise, or well-considered--only that it be nondiscriminatory . . . .[49]

In conclusion, one might well anticipate that the 1980s will be forced to wrestle with clarificatio- of previous rules as well as the development of new ones. Questions will be more detailed and more complex. The answers will be equally narrow in application and must be so applied.

The writer of this paper is of the opinion that both administrator and professor alike will be the beneficiary of a more consolidated effort in the best interest of the student. This effort would be one in which academic freedom would allow the institution of higher learning to once again establish itself as the testing place of ideas and the marketplace of some solutions to problems that face everyone in this great nation.

NOTES

1. *The University of California Regents* v. *Bakke,* 98 S. Ct. 2733, 57 L.Ed.2d 750 (1978).

2. *Weber* v. *Kaiser Aluminum and Chemical Co.,* 563 F. 2d 216 (5th Cir. 1977). Rehearing denied 571 F. 2d 337 (5th Cir. 1978). Certiorari granted

3. *Cannon* v. *University of Chicago,* No. 77–926 October Term, 1978 U. S. May 14, 1979.

4. *Gomes* v. *Rhode Island Interscholastic League,* _____F. 2d_____ (1st Cir.) May 7, 1979. Appeals court stayed order of district court that would have allowed male student to play on volleyball team at high school. Early arguments are planned on the case.

5. 429 U. S. 190 (1976).

6. 593 F. 2d 424 (1st Cir. 1979).

7. 455 F. Supp. 1212 (E.D. Mo. 1978).

8. 414 F. 2d 1068 (5th Cir. 1969). For article on intent and coverage of Title IX, *see* Kuhn, Title IX: Employment and Athletics are Outside HEW's Jurisdiction, 65 Georgetown L. Rev. 49, (1976).

9. 16 E.P.D. 8241 at p. 5243 (W.D. Wash. 1978).

10. For brief summary of issues and concerns, *see* Higher Education Daily. Monday, May 14, 1979, p. 1 & 2.

11. *Franklin* v. *Stanford,* No. 277253 (Calif. Super Ct. Sept. 1, 1978) (Mem.).

12. 55 Tex. L. Rev. 525, 531, N.46 (1977).

13. The *Bakke* quote, supra note 1 at 2760, where Mr. Justice Powell, speaking for the Court, addressed the issue of academic freedom in the following terms: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the four essential freedoms that comprise academic freedom: '. . . . It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' *Sweezy* v. *New Hampshire,* 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring). Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian* v. *Board of Regents,* 385 U.S.589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967): 'Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, rather than through any kind of authoritative selection" *United States* v. *Associated Press,* D.C., 52 F.Supp. 362, 372.' "

14. Supra, note 4.

15. 163 U. S. 537 (1896). To gain deeper insight into the prevailing philosophies of the "Plessey" era, *see* Glennon, Justice Henry Billings Brown: Values in Tension, 44 U.Colo.L. Rev. 553 (1973).

16. 14th Amendment. "Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

17. 27th Amendment. "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Section 3. This amendment shall take effect two years after the date of ratification."

18. 40 ALR Fed. 25.

19. *NLRB* v. *Yeshiva University*, _____F.2d_____, 98 L.R.R.M. 3245 (2d Cir. 1978).

20. *Anderson* v. *Board of Trustees of Community College*, 372 N.E.2d 718 (Ill. App. Ct. 4th Dist. 1978) and *Kinsner* v. *University of Miami*, 362 So.2d 449 (Fla. Dist. Ct. App. 3rd Dist. 1978).

21. Title IX (20 USCA 1681 et seq.)
(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;
(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;
(6) this section shall not apply to membership practices
(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or
(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;
(7) this section shall not apply to
(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
(B) any program or activity of any secondary school or educational institution specifically for
(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
(ii) the selection of students to attend any such conference;
(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other non-discrimination provisions of Federal law.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

22. Title VII, Sec. 702, 703(e)(2), also cited as 42 U.S.C. 2000 e–1 and 42 U.S.C. 2000 e–2–e–2.
§2000 e–1. This subchapter shall not apply to an employer with respect to the employment of aliens outside any State or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.
§2000 e–2–e–2. It shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or the educational institution or institution of learning is directed toward the propagation of a particular religion.

23. *VanPelt* v. *State Board for Community Colleges & Occupational Education,* 577 P.2d 765 (Colo. 1978).

24. *Searcy* v. *Cain,* 355 So.2d 347 (Ala. 1978).

25. *Gross* v. *University of Tennessee,* 448 F.Supp. 245 (W.D. Tenn. W.D. 1978).

26. *Atkinson* v. *Board of Trustees of University of Arkansas,* 559 S.W.2d 473 (Ark. 1977).

27. *Clasby* v. *University of Miami,* 356 So.2d 915 (Fla. Dist. Ct. App. 3rd Dist. 1978).

28. *Willens* v. *University of Massachusetts,* 570 F.2d 403 (1st Cir. 1978).

29. *Ezekial* v. *Winkley,* 572 P.2d 32 (Cal. 1977).

30. *Lorentzen* v. *Boston College,* 440 F.Supp. 464 (D. Mass. 1977).

31. *Lorbach* v. *Bradley,* 572 P.2d 824 (Col. 1977).

32. *State Ex.Rel.Eads* v. *Humphreys,* 562 S.W.2d 805 (Tenn. 1978).

33. *Pauk* v. *Board of Higher Euucation of the City of New York,* 406 N.Y.S. 2d 46 (Ap.Div. 1978).

34. *Bellak* v. *Franconia College,* 386 A.2d 1266 (N.H. 1978).

35. *Pinkney* v. *District of Columbia,* 439 F.Supp. 519 (Dist. Col. 1977).

36. *Middle Bucks Area Vocational Technical School* v. *Navarro*, 390 A.2d 325 (Pa. Cmwlth. Ct., 1978).

37. Supra, note 36.

38. *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978), cert. granted, 99 S.Ct. 295, 47 U.S.L.W. 3327, Nov. 14, 1978 (vacating and remanding).

39. *Furnco Construction Co.* v. *Waters*, 438 U.S._____, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

40. *Scheuer* v. *Creighton University*, 260 N.W.2d 595 (Neb. 1977).

41. Supra, note 7 at p. 1214.

42. *Ofsevit* v. *Trustees of California State University*, 148 Cal. Rptr. 1, 582 P.2d 88 (1978).

43. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977).

44. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969).

45. *Dixon* v. *Alabama State Board of Education*, 186 F.Supp. 145 (1960), 294 F.2d 150 (5th Cir. 1961).

46. 456 F.Supp. 2 (S.D. Miss. Jackson Div. 1977).

47. *Powell* v. *Syracuse University*, 580 F.2d 1150, 47 U.S.L.W. 2094 (2nd Cir. 1978).

48. Supra, note 47 at 1154.

49. Supra, note 47 at 1154.